CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 30 **FEBRUARY 28, 1996** **NO. 9**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 10, 113, 141, 144, and 181

(T.D. 96–14)

RIN 1515–AB87

NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)—IMPLEMENTATION OF DUTY-DEFERRAL PROGRAM PROVISIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations; corrections.

SUMMARY: This document makes two corrections to the document published in the Federal Register which set forth interim regulations establishing procedural and other requirements that apply to the collection, waiver and reduction of duties under the duty-deferral program provisions of the North American Free Trade Agreement (NAFTA). The corrections involve the discussion of the Paperwork Reduction Act under the SUPPLEMENTARY INFORMATION portion of the document and a cross-reference citation within the interim regulatory texts.

EFFECTIVE DATE: These corrections are effective January 1, 1996.

FOR FURTHER INFORMATION CONTACT: Angela Downey, Office of Field Operations (202–927–1082).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 30, 1996, Customs published in the Federal Register (61 FR 2908) as T.D. 96–14 a document setting forth interim regulations establishing procedural and other requirements that apply to the collection, waiver and reduction of duties under the duty-deferral program provisions of the North American Free Trade Agreement (NAFTA). The document prescribed the documentary and other requirements that must be followed when merchandise is withdrawn from a U.S. duty-deferral program either for exportation to another

NAFTA country or for entry into a duty-deferral program of another NAFTA county, the procedures that must be followed in filing a claim for a waiver or reduction of duties collected on such merchandise, and the procedures for finalization of duty collections and duty waiver or reduction claims. the document prescribed a January 1, 1996, effective date for the interim regulatory amendments.

This discussion of the Paperwork Reduction Act within the SUPPLEMENTARY INFORMATION portion of the document included figures regarding the reporting and/or recordkeeping burden associated with the information collection requirements under the interim regulatory texts, as reported to the Office of Management and Budget (OMB); however, the document incorrectly stated the hours reported to OMB with regard to the estimated total annual reporting and/or recordkeeping burden which should have read "213,960" hours. In addition, within the text of interim § 181.53(b)(4) as set forth in the document, the reference in the introductory sentence to "paragraph (e)(1) or (e)(2)" should have read "paragraph (b)(4)(i) or (b)(4)(ii)". This document corrects these two errors

CORRECTIONS OF PUBLICATION

Accordingly, the document published in the Federal Register as T.D. 96–14 on January 30, 1996 (61 FR 2908) is corrected as set forth below.

Correction to the Supplementary Information Section:

On page 2910, in the second column under the heading Paperwork Reduction Act, the figure "405,070 hours" after "Estimated total annual reporting and/or recordkeeping burden:" is corrected to read "213,960 hours".

Correction to the Interim Regulations:

On page 2913, in the second column, in the introductory sentence of § 181.53(b)(4), the reference "paragraph (e)(1) or (e)(2)" is corrected to read "paragraph (b)(4)(i) or (b)(4)(ii)".

Dated: February 8, 1996.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, February 16, 1996 (61 FR 6110)]

(T.D. 96–17)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback contracts approved August 17, 1995, to November 13, 1995, pursuant to Subpart C, Part 191, Customs Regulations; and approvals under Treasury Decision 84–49.

In the synopses below are listed for each drawback contract approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the proposal was signed, the basis for determining payment, the Regional Commissioner or Port Director to whom the contract was forwarded or approved by, and the date on which it was approved.

Dated: February 8, 1996.

WILLIAM G. ROSOFF,
Director,
International Trade Compliance Division.

(A) Company: Abbott Laboratories
Articles: Clarithromycin (Klaricid)
Merchandise: Cyclohexylketal reagent; aqueous hydroxylamine; hexamethyldisalazane
Factories: North Chicago & Abbott Park, IL
Proposal signed: June 21, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Chicago, September 22, 1995
Revokes: T.D. 93–62–A

(B) Company: BGF Industries, Inc.
Articles: Woven carbon fabrics
Merchandise: Thornel carbon fibers
Factory: Cheraw, SC
Proposal signed: June 26, 1995
Basis of claim: Appearing in
Contract forwarded to PD of Customs: New York, November 13, 1995

(C) Company: Flint Ink Corp., CDR Pigments & Dispersions Div.
Articles: Pigment inks
Merchandise: Copper phthalocyanine blue crude; tobias acid; bon acid; beta naphthol; dichlorobenzidine/dihydrochloride presscake; 2B acid; 4B acid
Factories: Cincinnati, OH; Ridgway, PA; Elizabethtown, KY
Proposal signed: July 10, 1995
Basis of claim: Used in
Contract forwarded to PD of Customs: New York, October 20, 1995

(D) Company: GE Chemicals, Inc.
Articles: Alphamethylstyrene-acrylonitrile-butadiene-styrene
Merchandise: Alpha-methylstyrene (AMS)
Factories: Washington, WV; Ottawa, IL; Oxnard, CA; Bay St. Louis, MS
Proposal signed: November 18, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Miami, September 20, 1995

(E) Company: The Goodyear Tire & Rubber Co.
Articles: V-belts; tires; aramid cord fabric
Merchandise: Aramid filament yarn
Factories: Akron, OH; Decatur & Gadsen, AL; Cartersville & Calhoun, GA; Danville, VA; Lawton, OK; Topeka, KS; Union City, TN; Houston & Beaumont, TX; Lincoln, NE
Proposal signed: May 18, 1995
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, September 11, 1995
Revokes: T.D. 94–67–J

(F) Company: Hanes Dye and Finishing Co.
Articles: Finished piece goods
Merchandise: Greige piece goods
Factory: Winston-Salem, NC
Proposal signed: February 27, 1995
Basis of claim: Used in, less valuable waste
Contract forwarded to PD of Customs: New York, November 8, 1995

(G) Company: Hoechst Celanese Corp.
Articles: Various high performance linear thermoplastic polymer products known as FORTRON
Merchandise: Polyphenylene sulfide resin
Factories: Summit, NJ; Florence, KY; Shelby, NC; Bishop, TX
Proposal signed: March 6, 1995
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, August 18, 1995

(H) Company: Hoechst Celanese Corp.
Articles: Dinitro aniline (DNA) pigments
Merchandise: 2,4-dinitro aniline (2,4-DNA)
Factory: Coventry, RI
Proposal signed: April 26, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, September 29, 1995

(I) Company: Hoffmann-La Roche Inc.
Articles: Beta carotene crystalline
Merchandise: B-ionone; etinol; vinylol; C10 dialdehyde
Factory: Freeport, TX
Proposal signed: July 13, 1995
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, August 30, 1995

(J) Company: Houston Marine Services, Inc.
Articles: Intermediate fuel oil; marine diesel oil
Merchandise: Distillate oil (No. 2); residual oil (No. 6)
Factories: Batytown & Port Arthur, TX
Proposal signed: February 3, 1995
Basis of claim: Used in
Contract forwarded to RC of Customs: Houston, September 5, 1995

(K) Company: Lonza Inc.
Articles: 2-amino-6-chloropurine (ACP)
Merchandise: Guanine
Factory: Conshohocken, PA
Proposal signed: January 4, 1995
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, September 15, 1995

(L) Company: The Lubrizol Corp.
Articles: Lubricant additives
Merchandise: Lubricating oil additive intermediate 121.59
Factories: Painesville, OH; Deer Park & Pasadena, TX
Proposal signed: July 11, 1995
Basis of claim: Used in
Contract forwarded to RC of Customs: Chicago, September 11, 1995

(M) Company: Mallinckrodt Chemical, Inc.
Articles: Various acaetaminophen products
Merchandise: p-aminophenol
Factory: Raleigh, NC
Proposal signed: June 23, 1995
Basis of claim: Used in
Contract forwarded to RC of Customs: Chicago, August 30, 1995
Revokes: T.D. 93–42–N (Mallinckrodt Specialty Chemicals Co.)

(N) Company: The Lubrizol Corp.
Articles: Lubricating oil additives
Merchandise: Lubricating oil additive intermediate 0839.2
Factories: Painesville, OH; Deer Park & Pasadena, TX
Proposal signed: July 11, 1995
Basis of claim: Used in
Contract forwarded to PD of Customs: Chicago, November 2, 1995

(O) Company: Monitor Aerospace Corp.
Articles: Wing spar
Merchandise: Aluminum plate
Factory: Amityville, NY
Proposal signed: March 23, 1995
Basis of claim: Used in, less valuable waste
Contract forwarded to RC of Customs: New York, September 11, 1995

(P) Company: Monsanto Co.
Articles: Santoquin (6-ethoxy-1,2-dihydro-2,2,4-trimethylquinoline), a/k/a Santoflex AW and Ethoxyquin
Merchandise: Para-phenetidine
Factory: Nitro, WV
Proposal signed: May 8, 1995
Basis of claim: Appearing in
Contract forwarded to PD of Customs: Chicago, October 17, 1995

(Q) Company: Mueller Copper Tube Co., Inc.
Articles: Copper tubing
Merchandise: Copper cathodes
Factory: Fulton, MS
Proposal signed: August 10, 1995
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New Orleans, October 4, 1995

(R) Company: Pfizer, Inc.
Articles: Alitame
Merchandise: Alitame pTSA a/k/a L-∝-aspartyl-N-(2,2,4,-tetramethyl-3-thietanyl)-D-alaninamide, mono(4-methylbenzenesulfonate)
Factories: Terre Haute, IN; Groton, CT; Milwaukee, WI
Proposal signed: February 21, 1995
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, August 17, 1995

(S) Company: Pillowtex Corp.
Articles: Pillows; comforters; featherbeds; feathers
Merchandise: Crude duck down with feathers; crude goose down with feathers
Factories: Dallas, TX (2); Chicago, IL; Hanover, PA; Los Angeles, CA; Rocky Mount, NC; Tunica, MS; Monroe, NC (Agent); Lebanon, TN (agent)
Proposal signed: June 28, 1995
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to RC of Customs: Houston, September 11, 1995

(T) Company: Rhône-Poulenc Inc.
Articles: Regent® pesticide formulations
Merchandise: Fipronil® technical
Factory: St. Louis, MO
Proposal signed: January 17, 1995
Basis of claim: Appearing in
Contract forwarded to PD of Customs: New York, October 20, 1995

(U) Company: Rohm and Haas Delaware Valley, Inc.
Articles: Plexiglass sheet; plexiglass molding powder; Implex molding powder; other monomer blends; acryloid modifiers (K series); other modifiers; emulsions (Rhoplex and Primal, Acrysol and Rhotex), acryloid solution coatings; acryloid solid coatings; orthochrom-primal colors and auxiliaries
Merchandise: Ethyl acrylate
Factory: Bristol, PA
Proposal signed: July 12, 1995
Basis of claim: Used in
Contract forwarded to RC of Customs: Houston, October 4, 1995
Revokes: T.D. 79–281–T

(V) Company: Rohm and Haas Delaware Valley, Inc.
Articles: Plexiglas sheet; plexiglas & implex molding powders; Kydex sheet; distilled grades of inhibited and/or uninhibited methyl methacrylate; specialty methacrylates; monomer blends; acryloid modifiers (K series); various other modifiers; emulsions (Rhoplex; Primal; Acrysol; Rhotex); acryloid solution & solid coatings; acryloid coatings & resins; Paraplex P series; orthochrom-Primal colors & auxiliaries; oil additives (VI improvers; HF grades & mis cellaneous)
Merchandise: Methyl methacrylate
Factories: Philadelphia & Bristol, PA
Proposal signed: July 11, 1995
Basis of claim: Used in
Contract forwarded to PD of Customs: Houston, October 17, 1995
Revokes: T.D. 80–175–X

(W) Company: Tauber Oil Co.
Articles: Intermediate fuel oil
Merchandise: Marine diesel oils; residual oil (No. 6)
Factory: Houston, TX
Proposal signed: April 20, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Houston, September 5, 1995

(X) Company: Tropicana Products, Inc.
Articles: Frozen concentrated orange juice; bulk concentrated orange juice; orange juice from concentrate (reconstituted); juices of various juice blends, each containing concentrated orange juice for manufacturing
Merchandise: Concentrated orange juice for manufacturing
Factories: Bradenton & Ft. Pierce, FL
Proposal signed: June 25, 1995
Basis of claim: Appearing in
Contract forwarded to PD of Customs: Miami, October 26, 1995

(Y) Company: Yorkshire Dried Fruit & Nuts, Inc.
Articles: Whole pitted prunes
Merchandise: Whole unpitted prunes
Factory: Fresno, CA
Proposal signed: August 8, 1995
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation Unit), August 23, 1995

(Z) Company: Yorkshire Dried Fruit & Nuts, Inc.
Articles: Prune juice
Merchandise: Substandard dried prunes
Factories: at its agents operating under T.D. 55027(2) and/or T.D. 55207(1)
Proposal signed: September 13, 1995
Basis of claim: Used in
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation Unit), September 27, 1995

APPROVALS UNDER T.D. 84–49

(1) Company: BHP Petroleum Americas Refining, Inc.
Articles: Petroleum products and petrochemicals
Merchandise: Crude petroleum and petroleum derivatives
Factory: Kapolei, HI
Proposal signed: April 18, 1995
Basis of claim: As provided in T.D. 84–49
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation Unit), August 24, 1995

(2) Company: Oxy Petrochemicals Inc.
Articles: Propylene; ethylene; raffinates; benzene; pyrolysis gas; light fuel oil; blended fuel oil; butadiene; butylene; ethylbenzene; products to fuel; MTBE; biphenyl concentrate
Merchandise: Naptha, Class IV; condensate Class IV; distillate, Class IV
Factories: Corpus Christi & Chocolate Bayou, TX
Proposal signed: August 7, 1995
Basis of claim: As provided in T.D. 84–49
Contract forwarded to PD of Customs: Houston, October 10, 1995

(3) Company: Sun Company, Inc. (R&M)
Articles: Various petroleum products and petrochemicals
Merchandise: Crude petroleum and petroleum derivatives
Factories: Marcus Hook, PA; Philadelphia, PA (2); Toledo, OH; Tulsa, OK
Proposal signed: January 27, 1995
Basis of claim: As provided in T.D. 84–49
Contract forwarded to RCs of Customs: Boston & Houston, August 17, 1995
Revokes: T.D. 82–182(2) (Sun Refining and Marketing Co.)

19 CFR Parts 10, 18 and 113

(T.D. 96–18)

RIN 1515–AB67

WAREHOUSE WITHDRAWALS; AIRCRAFT FUEL SUPPLIES; PIPELINE TRANSPORTATION IN BOND OF MERCHANDISE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of interim regulations, solicitation of comments.

SUMMARY: The amendments contained in this document are being published as interim regulations to implement certain statutory amendments to the Customs laws regarding recordkeeping for merchandise transported by pipeline and duty-free withdrawals from Customs bonded warehouses of aircraft turbine fuel. These statutory amendments are contained in the Customs modernization provisions of the North American Free Trade Agreement Implementation Act. Also, the interim regulations clarify the procedures applicable to aircraft turbine fuel which is withdrawn from a Customs bonded warehouse for certain duty-free use and is commingled with other lots of fuel before being so used.

DATE: Interim rule effective April 8, 1996; comments must be received on or before March 25, 1996.

ADDRESS: Written comments (preferably in triplicate) must be submitted to U.S. Customs Service, ATTN: Regulations Branch, Franklin Court, 1301 Constitution Avenue, NW., Washington, DC 20229, and may be inspected at the Regulations Branch, 1099 14th Street, NW., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Office of Regulations and Rulings, (202–482–7040).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, the President of the U.S. signed into law the North American Free Trade Agreement Implementation Act (Public Law 103–182, 107 Stat. 2057). Title VI of this Act, popularly known as the Customs Modernization Act (the Act) amended certain Customs laws. Section 664 of the Act amended the Customs laws by the insertion of a new section 553a, Tariff Act of 1930 (19 U.S.C. 1553a), and section 665 of the Act amended section 557(a), Tariff Act of 1930, as amended (19 U.S.C. 1557(a)).

Under the new 19 U.S.C. 1553a, merchandise in Customs custody that is transported by pipeline may be accounted for on a quantitative basis. The term "merchandise in Customs custody," is meant to comprise

bonded merchandise *(e.g.,* merchandise which has not been entered for consumption, including merchandise transported in bond, merchandise from a Customs bonded warehouse, or merchandise from a foreign trade zone) (see legislative history for this provision in H.R.Rep.No. 103–361, 103d Cong., 1st Sess., Pt. 1, 150–151 (1993), and S.Rep.No. 103–189, 103d Cong., 1st Sess., 97 (1993)). Section 1553a provides for the use of the bill of lading or equivalent document of receipt, issued by the pipeline carrier to the shipper and accepted by the consignee, to account for the quantity of merchandise transported and to maintain the identity of that merchandise. Unless Customs has reasonable cause to suspect fraud, the provision authorizes Customs to accept the bill of lading, or equivalent document of receipt, for this purpose. Under 19 U.S.C. 1553a, the shipper, pipeline operator, and consignee are subject to the recordkeeping requirements of sections 508 and 509, Tariff Act of 1930, as amended (19 U.S.C. 1508, 1509).

The background to, and reasons for, the addition of 19 U.S.C. 1553a to the Customs laws are explained in the legislative history for the Act (H.Rep.No. 361, *ibid.,* and S.Rep.No. 189, *ibid.).* Currently, there is no provision in the Customs laws or regulations governing the transportation of bonded merchandise by pipeline. The general provisions currently governing transportation in bond (entry for immediate transportation and entry for transportation and exportation; sections 552 and 553, Tariff Act of 1930, as amended (19 U.S.C. 1552, 1553)), do not authorize the commingling of bonded merchandise with nonbonded merchandise in the transportation. Most merchandise transported by pipeline is commingled and is susceptible to quantitative accounting (see H.Rep.No. 189, *ibid.).* Analogous to the amendment to 19 U.S.C. 1557(a) (discussed below), the new provision permits the effective use of modern fuel transportation systems and will reduce administrative costs and paperwork for the industry and the Government.

Under the amendment to 19 U.S.C. 1557(a), turbine fuel may be withdrawn from a Customs bonded warehouse for use under section 309, Tariff Act of 1930, as amended (19 U.S.C. 1309), without the payment of duty if an amount equal to the quantity of fuel withdrawn is shown to be used as provided for in section 1309 within 30 days of withdrawal. Under section 1309, in part, articles may be withdrawn from any Customs bonded warehouse free of duty for supplies of foreign or U.S. vessels or aircraft actually engaged in foreign trade or trade between the U.S. and any of its possessions, or between Hawaii and any other part of the U.S. or between Alaska and any other part of the U.S. Section 1309 contains an exception under which the provisions for free withdrawals in that section are not applicable to petroleum products for vessels or aircraft in voyages or flights exclusively between Hawaii or Alaska and any airport or Pacific coast seaport of the U.S.

Under the amended 19 U.S.C. 1557(a), duties are required to be deposited on turbine fuel which was withdrawn in excess of the quan-

tity shown to have been used under 19 U.S.C. 1309 during the 30-day period following withdrawal of the fuel. Such duties must be deposited by the 40th day after the date of withdrawal of the fuel. Interest on the duties is payable from the date of withdrawal.

The background to, and reasons for, the amendment to 19 U.S.C. 1557(a) are explained in the legislative history for the Act (H.Rep.No. 361, *ibid.,* and S.Rep.No. 189, *ibid.).* According to these reports, the nature of major airport fueling systems is that different lots (bonded, imported, domestic, etc.) of turbine fuel are commingled in a common hydrant system. Under the law and regulations before the amendment of 19 U.S.C. 1557(a), Customs considered withdrawal of fuel from storage tanks at airports into the common hydrant system as withdrawal from bonding. Therefore, in order for such bonded fuel to qualify for the duty-free treatment authorized under 19 U.S.C. 1309, Customs required daily accounting for the commingled bonded fuel.

According to the industry, identifying the turbine fuel which is used for flights qualifying under 19 U.S.C. 1309 and that used for non-qualifying flights at the time that turbine fuel is entered into the common hydrant system is impracticable and, if possible, would result in great administrative expense and excessive paperwork. Alternatively, requiring multiple hydrant systems (for different lots of turbine fuel) is physically impracticable at most airports and would also result in great expense.

According to this legislative history, the amendment to 19 U.S.C. 1557(a) will permit the effective use of modern fueling systems at U.S. airports. It will also permit the intended use of existing law *(i.e.,* 19 U.S.C. 1309) permitting the duty-free withdrawal of supplies for qualifying aircraft. Further, it will substantially reduce administrative costs and paperwork for the industry and administrative costs for the Government.

Because Customs is aware of some confusion regarding the possibility of similar treatment of turbine fuel removed from a foreign trade zone for flights qualifying under 19 U.S.C. 1309, we are noting in this document that there is no provision for foreign trade zones in the Act similar to the amendment to 19 U.S.C. 1557(a) effected by section 665 of the Act. It is true that the legislative history to section 637 of the Act amending the statute governing formal entry (19 U.S.C. 1484) indicates that Congress intended that Customs, in developing regulations for periodic entry, should allow for weekly and monthly entries for merchandise shipments from general purpose foreign trade zones and subzones (see H.Rep.No. 361, *ibid.,* at 136). The amendments effected by section 637 of the Act, however, are general amendments regarding formal entry requirements and procedures, under which amendments to the regulations governing formal entry (see parts 141, 142, and 143) are under consideration. By contrast, the sections of the Act implemented by this document are specific provisions relating to the subject matter of this document, and *not* to removals of turbine fuel from foreign trade

zones. As stated above, no such provision *(i.e.,* specifically governing removal from a foreign trade zone of turbine fuel for use on qualifying flights under 19 U.S.C. 1309) was enacted in the Act. Therefore, because this document is intended to implement the specific provisions effected by sections 664 and 665 of the Act, no specific provision is promulgated in this document providing for periodic entries of turbine fuel removed from a foreign trade zone for use on qualifying flights under 19 U.S.C. 1309. (We do note, however, that the regulations implementing section 664 of the Act may affect turbine fuel removed from a foreign trade zone and transported by pipeline to the location where it may be loaded on qualifying flights under 19 U.S.C. 1309.)

PIPELINE TRANSPORTATION IN BOND

The Customs Regulations generally pertaining to the transportation of merchandise in bond are currently found in part 18. These interim regulations implement the new 19 U.S.C. 1553a by the addition to part 18 of a new § 18.31. Generally, this new § 18.31 provides that merchandise may be transported by pipeline under the procedures provided for in part 18, unless otherwise specifically provided. The new § 18.31 provides for the acceptance by Customs of a bill of lading or equivalent document of receipt to account for the quantity of merchandise transported and to maintain the identity of the merchandise, under the circumstances provided in the statute *(i.e.,* the bill of lading or equivalent document of receipt must be issued by the pipeline operator to the shipper and accepted by the consignee and there must be no reasonable cause for Customs to suspect fraud).

Basically, the new § 18.31 adopts the current procedures for transportation in bond, as applicable to pipeline transportation. That is, generally, merchandise to be transported in bond between ports in the U.S. is delivered to a common carrier, contract carrier, freight forwarder, or private carrier bonded for that purpose. The carrier prepares an in-bond document and takes receipt of the merchandise. The in-bond document (which also serves as the transportation entry or withdrawal), with receipt of the merchandise by the carrier noted thereon, together with a Customs control card or carnet, is used as the in-bond manifest for the merchandise to its port of destination.

Delivery of the merchandise at the port of destination is required within 30 days after the date of receipt by the carrier at the port of origin, or 60 days after such date if the merchandise is transported on board a vessel engaged in the coastwise trade (except for transit air cargo in which case 10 days is given, under § 122.118). Within 2 days of arrival of the merchandise at the port of destination, the delivering carrier is required to report the arrival to Customs by surrendering the in-bond manifest to Customs at that port.

Under its bond, the initial carrier is responsible for any shortage, irregular delivery, or nondelivery at the port of destination or exportation. Specific provision is made for transshipment to one or more other conveyances, diversion to a different port, the different kinds of trans-

portation entry or withdrawal which may be made *(i.e.,* for immediate transportation, exportation, and transportation and exportation), change of the foreign destination of merchandise entered or withdrawn for transportation and exportation, retention of merchandise on the dock, and the splitting of a shipment of merchandise for exportation.

In addition to incorporating these general requirements, the new § 18.31 provides for the inclusion of the bill of lading or equivalent document of receipt with the Customs in-bond document for merchandise to be transported in bond by pipeline. Provided that there are no discrepancies between the bill of lading or equivalent document of receipt and the other documents making up the in-bond manifest for the merchandise, and provided that Customs has no reasonable cause to suspect fraud, the bill of lading or equivalent document of receipt is to be accepted by Customs at the port of destination or exportation as establishing the quantity and identity of the merchandise transported.

In cases in which the initial carrier transfers or transships merchandise to another conveyance or carrier, the new § 18.31 generally adopts the procedures in the current provision for transshipment (§ 18.3). Basically, those procedures require the in-bond document accompanying the merchandise to be presented to Customs at the place of transshipment for execution of a certificate of transfer on the document. The notated document then accompanies the merchandise to its port of destination or exportation. If the merchandise is to be transshipped to more than one conveyance, additional copies of the in-bond document are required.

In addition to these procedures, the new § 18.31 provides that, if a pipeline is the initial carrier, a copy of the bill of lading or equivalent document of receipt shall be delivered to the person in charge of the conveyance to which the merchandise is transferred, and if the merchandise is transferred to more than one conveyance, to the person in charge of each of the conveyances. If the initial carrier is not a pipeline, the new § 18.31 provides for the delivery, along with the in-bond document, of the bill of lading or equivalent document of receipt issued by the pipeline operator to the shipper to the appropriate Customs official at the port of destination or exportation. As is currently provided in § 18.3, the in-bond document will be executed by Customs with the certificate of transfer in either case *(i.e.,* if a pipeline is the initial carrier or if the initial carrier is not a pipeline).

The new § 18.31 also makes it clear, as is currently provided in part 18 (see § 18.8), that the initial carrier is responsible for any discrepancies, including shortages, irregular deliveries, or nondeliveries at the port of destination or exportation. As provided in 19 U.S.C. 1553a, the new § 18.31 provides that the shipper, pipeline operator, and consignee are subject to the recordkeeping requirements in 19 U.S.C. 1508 and 19 U.S.C. 1509, as provided in 19 CFR part 162.

To make it clear to the public that the Customs Regulations pertaining to transportation in bond apply to transportation by pipeline, the

definition of "common carrier" in § 18.1(a)(1) is amended to specifically include a common carrier of merchandise owning or operating a pipeline.

WITHDRAWAL OF FUEL FROM WAREHOUSE

The Customs Regulations pertaining to the withdrawal of merchandise from a Customs bonded warehouse are found in part 144. Under § 144.35, the withdrawal from warehouse of supplies and equipment for vessels and aircraft are provided for in subpart D of part 144 and §§ 10.59 through 10.65. The latter contain specific provisions on the duty-free treatment of supplies for foreign or U.S. vessels and aircraft actually engaged in foreign trade under 19 U.S.C. 1309. Pursuant to § 10.59(d), although the provisions in §§ 10.59 through 10.64 are written in terms of vessels, they are made applicable to aircraft insofar as they may be so applicable. Specific provisions for the withdrawal of fuel as supplies under 19 U.S.C. 1309 for vessels or aircraft are provided in § 10.62.

These interim regulations implement the amendment to 19 U.S.C. 1557(a) by the addition of a new § 10.62b to part 10. Under the new § 10.62b, turbine fuel intended for use as supplies on aircraft under 19 U.S.C. 1309 which is withdrawn from a Customs bonded warehouse is entitled to duty-free treatment under 19 U.S.C. 1309 if an amount equal to or exceeding the quantity of such fuel is established to have been used on aircraft qualifying for duty-free treatment under 19 U.S.C. 1309 within 30 days after the withdrawal of the fuel from the Customs bonded warehouse. For the procedures for such withdrawals, § 10.62b adopts the procedures now provided for in §§ 10.59 through 10.65. Section 10.62b provides that withdrawals under that provision shall be annotated to show the kind of withdrawal.

If less fuel than was withdrawn is used within 30 days of withdrawal on qualifying aircraft, a withdrawal for consumption must be filed and duties must be paid for the excess of fuel withdrawn over that used on qualifying aircraft. The withdrawal for consumption must be filed and the duties must be paid, with interest, by the 40th day after the date of withdrawal of the fuel. Interest is calculated from the date of withdrawal at the rate of interest established under 26 U.S.C. 6621.

The new § 10.62b provides for two alternative ways of establishing use by qualifying aircraft of fuel in an amount equal to or exceeding the quantity of the fuel withdrawn under the provision.

In the first alternative, the person withdrawing the aircraft turbine fuel submits records (*e.g.*, "uplift" or refueling tickets) prepared in the normal course of business effecting the transfer to aircraft of fuel in an amount equal to or exceeding the quantity of the fuel withdrawn which is not entered and on which duties are not paid and objective evidence that the aircraft to which the fuel was transferred were actually used in trade qualifying for the privileges provided in 19 U.S.C. 1309. These records must identify the aircraft to which the fuel is transferred by air-

craft company name, flight number, flight origin and destination, and date of flight, or other means of identification satisfactory to Customs.

In the second alternative, the person withdrawing the aircraft turbine fuel files a certification (documentary or electronic) certifying: (1) the intended use under 19 U.S.C. 1309 of all of the fuel withdrawn; (2) the transfer to qualifying aircraft within 30 days of the date of withdrawal from warehouse of an amount of fuel equal to or exceeding the quantity of the fuel withdrawn which is not entered and on which duties are not paid; (3) the use of all aircraft onto which the fuel, which is not entered and on which duties are not paid, was uplifted in trade qualifying for treatment under 19 U.S.C. 1309; and (4) that the person making the certification has evidence (documentary or electronic) available for Customs inspection at a named place which supports each of these statements. Under the second alternative, the person making the certification must promptly provide evidence supporting the claim, including the records described in the other alternative means of establishing use of the fuel on a qualifying aircraft (above), upon request by Customs. The records or certification are required to be submitted to Customs by the 40th day after the date of withdrawal of the fuel unless the fuel was withdrawn under a blanket permit to withdraw, in which case the records or certification are required to be submitted by the 40th day after all of the fuel covered by the blanket permit has been withdrawn.

The new § 10.62b provides for liquidated damages against the person withdrawing turbine fuel under the section, under the provisions of § 113.62, for failure to account for such turbine fuel. Failure to account for such turbine fuel includes: (1) the failure to file, within 40 days from the date of withdrawal, a withdrawal for consumption and pay applicable duty, with interest, on the quantity of fuel withdrawn in excess of the quantity of fuel established to have been used on qualifying aircraft within 30 days of withdrawal; (2) the failure to timely file the evidence or certification, provided for in the new § 10.62b, establishing such use of the fuel which is not entered and on which duties are not paid; or (3) the failure to promptly provide, upon request by Customs, the evidence required to support the claim for treatment under the new § 10.62b. A conforming amendment is made to § 113.62, containing the basic importation and entry bond conditions.

The new § 10.62b provides that "blanket" withdrawals, under existing regulations except as specifically provided in the provision, may be used for withdrawals under this provision. Under a blanket withdrawal, all or part of the merchandise entered into a warehouse may be withdrawn, at different times if desired, without further Customs approval *(i.e.,* after approval of the blanket permit) (see 19 CFR 19.6(d)).

Because it is anticipated that blanket withdrawals will be the predominant form of withdrawal under the amended 19 U.S.C. 1557(a) and because of the need for certainty as to the time of withdrawal under the amended 19 U.S.C. 1557(a), we are describing in detail the require-

ments and procedures for blanket withdrawals under § 10.62b. As noted above, unless otherwise provided in § 10.62b, these procedures are provided for in existing regulations, specific provisions of which are cited in the following description, along with citations to the appropriate paragraphs in the new § 10.62b.

As is true currently under § 10.62, blanket withdrawals under § 10.62b may only be used when all of the turbine fuel in a Customs bonded tank is intended only for loading duty-free as supplies on aircraft qualifying for the privileges provided for in 19 U.S.C. 1309 (§ 10.62(a)). Unlike other blanket withdrawals (see §§ 10.62(a) and 19.6(d)(1)), turbine fuel withdrawn under these blanket withdrawal procedures may be delivered at ports other than the port of withdrawal (§ 10.62b(g)(2)).

Applications for permission for blanket withdrawals under § 10.62b are filed with Customs by the withdrawer on the warehouse entry, or on the warehouse entry/entry summary when used as an entry (§ 10.62b(g)(1)). The warehouse entry or entry/entry summary must be annotated to indicate that permission for blanket withdrawal is sought (§§ 19.6(d)(1) and 10.62b(g)(1)). Customs acceptance of a properly completed application for a blanket permit to withdraw constitutes approval of the blanket permit to withdraw (§ 10.62b(g)(3)).

A copy of the approved blanket permit to withdraw is delivered to the warehouse proprietor after which fuel may be withdrawn under the terms of the permit (§ 10.62b(g)(4)). The blanket permit may be revoked by Customs in favor of individual applications and permits if the permit is found to be used for other purposes or if necessary to protect the revenue or properly enforce any law or regulation administered by Customs (§ 19.6(d)(1)). Withdrawals under an approved blanket permit may be made without any further Customs approval and are documented by the placement in the warehouse proprietor's permit file folder of a copy of a commercially acceptable document of receipt (such as a "withdrawal ticket") issued by the warehouse proprietor, identified with a unique alpha-numeric code (§§ 19.6(d)(2) and 10.62b(g)(4) and (g)(5)). These documents of receipt are required to contain the identity of the withdrawer, identity of the warehouse and tank from which the fuel is withdrawn, date of withdrawal, type of merchandise withdrawn, and quantity of merchandise withdrawn (§ 10.62b(g)(5)(i) through (v)).

For blanket withdrawals, the date of withdrawal, for purposes of calculating the 30-day period in which fuel must be used on qualifying aircraft under 19 U.S.C. 1557(a), begins with the date on which physical removal of the fuel from the warehouse commences (§ 10.62b(g)(6)). That is, if removal of fuel begins at 10:00 PM on "day one" and is not completed until some time on "day two" or later, all of the fuel must be used on qualifying aircraft within 30 days from "day one" to qualify for treatment under that provision.

If, within the 30-day period following withdrawal under a blanket permit, less fuel is used on qualifying aircraft than was withdrawn, a

withdrawal for consumption must be filed and duties must be paid for the excess of fuel withdrawn over that used on qualifying aircraft. As provided by the amended 19 U.S.C. 1557(a) and these interim regulations (§ 10.62b(e)), the withdrawal for consumption must be filed and the duties must be paid, with interest, by the 40th day after the date of withdrawal of the fuel.

When all of the fuel covered by an entry for which a blanket permit to withdraw was issued has been withdrawn, the warehouse proprietor prepares a blanket permit summary on a copy of Customs Form 7506 or a form on the letterhead of the proprietor, bearing the words "BLANKET PERMIT SUMMARY" in capital letters conspicuously printed or stamped in the top margin (§§ 19.6(d)(4) and 10.62b(g)(7)). The blanket permit summary is required to provide an accounting of the disposition of the merchandise covered by the blanket permit by stating, in summary form, the unique alpha-numeric codes for, and information required on the withdrawal documents, as well as the identity of the warehouse entry to which the withdrawals are attributed (§§ 19.6(d)(4) and 10.62b(g)(7)). The warehouse proprietor is required to certify on the blanket permit summary that the merchandise listed therein was withdrawn in compliance with §§ 10.62, 10.62b, and 19.6(d) (§§ 19.6(d)(4) and 10.62b(g)(8)). The blanket permit summary is placed in the warehouse proprietor's permit file folder and treated as provided in § 19.12, regarding warehouse recordkeeping, storage, and security requirements (§ 19.6(d)(4)).

By the 40th day after all of the fuel covered by the blanket permit has been withdrawn, the person withdrawing aircraft turbine fuel is required to submit to Customs either the records or the evidence provided for in § 10.62b(c) (§ 10.62b(d) and (g)(9)). Discretionary authority is given to the port director to require submission of a summary of these records or evidence, along with the evidence required to establish use of fuel on qualifying aircraft, in electronic form. Such submissions must be in a format compatible with Customs systems (§ 10.62b(g)(9)).

The new § 10.62b provides that the person withdrawing aircraft turbine fuel from warehouse under the provision is subject to the recordkeeping requirements in 19 U.S.C. 1508 and 19 U.S.C. 1509, as provided for in part 162.

Conforming amendments are made to the general provisions for withdrawal under 19 U.S.C. 1309 in §§ 10.60 and 10.62. In the case of the amendment to § 10.60, the amendment concerns the general requirement that supplies to be used at a port other than the port of withdrawal from warehouse must be withdrawn on a withdrawal for transportation in bond. The amendment makes it clear that this general requirement is inapplicable in the case of withdrawals under the new § 10.62b. In the case of the amendment to § 10.62, the amendment alerts the public to the fact that there is an alternative provision for aircraft turbine fuel withdrawn from warehouse, provided for in § 10.62b,

to the general procedures and requirements for withdrawal of bunker fuel under 19 U.S.C. 1309.

The interim regulation also promulgates by regulation, in the new § 10.62b, a position taken by Customs in interpretative rulings regarding the commingling in a single hydrant fueling system of aircraft turbine fuel from a Customs bonded warehouse with domestic or other fuel when the fuel from the warehouse is intended for use under 19 U.S.C. 1309. Generally, under these rulings, dated October 20, 1989 (File: 221483), May 8, 1990 (File: 222258), and April 29, 1991 (File: 222914), Customs permitted such commingling if two basic conditions were met. The first of these conditions was that the hydrant system must be physically configured so that once the fuel from the warehouse was introduced or commingled into the single hydrant system, it could not be removed otherwise than by being pumped into aircraft. The second of these conditions was that the commingled fuel must be accounted for on the basis of a 24-hour accounting period (*i.e.*, entry must be made and duty paid for any quantity of the fuel from the warehouse which was introduced into the hydrant system when a like quantity was not loaded on aircraft qualifying for duty-free treatment under 19 U.S.C. 1309 within 24 hours of the introduction of the fuel from the warehouse into the hydrant system). The rulings held that the requirement for accounting on the basis of a 24-hour period meant that the fuel from the warehouse introduced or commingled into the single hydrant system must be loaded onto a qualifying aircraft in the same 24-hour period (defined as a 24 hour period beginning at 12:01 a.m. and ending at 12:00 midnight). The legislative history for the amendment to 19 U.S.C. 1557(a), described above, recognized and confirmed the foregoing Customs interpretations of the then applicable law and regulations.

As stated above, the position taken in these rulings is implemented in the new § 10.62b. Paragraph (a) of that section contains a provision making the position taken in these rulings the general rule. That is, paragraph (a) provides that, unless otherwise provided (the provision for withdrawal from warehouse under the amended 19 U.S.C. 1557(a), provided for in the other paragraphs of § 10.62b, does, of course, otherwise provide), aircraft turbine fuel withdrawn from a Customs bonded warehouse for use under 19 U.S.C. 1309 may be commingled with domestic or other aircraft turbine fuel only upon approval by the authorized Customs official. Customs approval for such commingling would have to be obtained under the appropriate provisions in the Customs Regulations (subpart D of part 144).

Under paragraph (a) of § 10.62b, the authorized Customs official may approve such commingling if the fueling system in which the commingling occurs contains physical safeguards preventing the possible unauthorized entry into the Customs territory of the fuel. The commingled fuel must be accounted for in the same 24-hour period in which it was commingled and must be exported or used under 19 U.S.C. 1309 within that 24-hour period or entered or withdrawn for consumption,

with duty deposited, as required under the appropriate regulations (see part 144). As noted above, the specific provision for the duty-free withdrawal of aircraft turbine fuel from a Customs bonded warehouse if the fuel is used on an aircraft qualifying for duty-free treatment under 19 U.S.C. 1309, provided for in the amendment to 19 U.S.C. 1557(a) and paragraphs (b) through (h) of § 10.62b, is an exception from the above-described general rule.

DELAYED EFFECTIVE DATE AND PUBLIC COMMENT REQUIREMENTS

The agency intends that these interim regulations will become effective on the 45th day following the date of publication, *i.e.*, 15 days after the close of the comment period. The agency believes it has good cause under 5 U.S.C. 553(b)(B) and 553(d)(1) and (3) of the Administrative Procedure Act (APA) (5 U.S.C. 553) to promulgate interim regulations because the regulations provide an immediate benefit to both the Government and the public by reducing administrative costs and paperwork pursuant to specific statutory authority. These interim regulations are intended to implement Congressional intent embodied in §§ 553a and 557(a), Tariff Act of 1930, as amended (19 U.S.C. 1553a and 1557(a)), and specifically stated in the legislative history to those provisions, as described above.

Furthermore, existing rights and obligations are not changed otherwise than as authorized by the new statutory provisions. The agency believes that the affected public wants these new statutory provisions to become effective as soon as possible so that the public can benefit from the efficiencies and savings resulting therefrom. In addition, the agency does not believe the public needs time to conform its conduct so as to avoid violation of these regulations *(i.e.*, because the new provisions are permissive, not restrictive). The due and timely execution of the agency's responsibilities would be unnecessarily impeded by a time consuming notice and comment period. The agency believes such delay is unnecessary because it does not expect the public to object to the regulations being promulgated as they merely provide the relief that Congress intended.

Even though, based on the discussion set forth above, Customs believes the amendments in this document may be promulgated on an interim basis and could be effective immediately, Customs is providing a 45-day delayed effective date, with a 30-day comment period preceding that effective date. This represents a practical compromise between the need for temporal urgency and the desirability for public participation in the rulemaking process.

In the spirit of the APA, the agency is soliciting public comment regarding both the substance of these interim regulations and Customs decision to promulgate these regulations on an interim basis with the effective date delayed for that period of time necessary to review any relevant comments. Unless the comments show that there exists good cause for not making the regulations effective on an interim basis, the

regulations will become effective on an interim basis on the 45th day following the date of publication.

COMMENTS

Consequently, the agency hereby solicits comments on both the substance of these regulations and their intended effective date. The comments should clearly state whether they address the substance of the interim rule or the agency's determination to make the rule effective on an interim basis. If, based on the comments, good cause is shown that the regulations should not become effective on an interim basis, a document will be issued withdrawing the interim regulations before their effective date. If no such good cause is shown, the interim regulations will go into effect. The agency will then be able to gain experience with the interim regulation, fully consider substantive comments, and decide whether the interim regulation needs amendment before its promulgation as a final rule. All substantive comments received timely will be considered and will be addressed in the final rule document.

Consideration will be given to any written comments (preferably in triplicate) that are timely submitted to Customs. All such comments received from the public pursuant to this notice of rulemaking will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), during regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, 1099 14th Street, NW., Suite 4000, Washington, DC.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)*. This document is not a "significant regulatory action" under E.O. 12866.

PAPERWORK REDUCTION ACT

This regulation is being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in this regulation has been reviewed and, pending receipt and evaluation of the public comments, approved by the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 2507) under control number 1515–0209.

The collection of information in this regulation is in § 10.62b. This information is required by Customs to ensure compliance with the statute authorizing the described procedure. This information will be used to verify that turbine fuel withdrawn from a Customs bonded warehouse under 19 U.S.C. 1557(a) is used on aircraft qualifying for duty-free withdrawal of fuel supplies, as required under the law. The likely recordkeepers are businesses.

Estimated total annual reporting and/or recordkeeping burden: 240 hours.

Estimated average annual burden hours per recordkeeper: 12 hours.

Estimated number of respondents and/or recordkeepers: 20.

Estimated annual frequency of responses: 12.

Comments concerning the collection of information and the accuracy of the estimated average annual burden, and suggestions for reducing this burden should be directed to the Office of Management and Budget (OMB), Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503. A copy should also be sent to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, DC 20229.

DRAFTING INFORMATION

The principal author of this document was Paul G. Hegland, Entry Rulings Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 10

Customs duties and inspection, Exports, Imports, Reporting and recordkeeping requirements, Shipments.

19 CFR Part 18

Bonded transportation, Common carriers, Customs duties and inspection, Exports, Imports.

19 CFR Part 113

Common carriers, Customs duties and inspection, Exports, Freight, Laboratories, Reporting and recordkeeping requirements, Surety bonds.

AMENDMENTS

Title 19, Chapter I, parts 10, 18 and 113 of the Customs Regulations (19 CFR parts 10, 18 and 113) are amended as set forth below:

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority for part 10 continues to read as follows, and specific authority, for new § 10.62b, is added as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1321, 1481, 1484, 1498, 1508, 1623, 1624;

* * * * * * *

§ 10.62b also issued under 19 U.S.C. 1557;

* * * * * * *

2. Section 10.60 is amended by revising the first sentence of paragraph (d) to read as follows:

§ 10.60 Forms of withdrawals; bond.

* * * * * * *

(d) Except as otherwise provided in § 10.62b, relating to withdrawals from warehouse of aircraft turbine fuel to be used within 30 days of such withdrawal as supplies on aircraft under § 309, Tariff Act of 1930, as amended, when the supplies are to be laden at a port other than the port of withdrawal from warehouse, they shall be withdrawn for transportation in bond to the port of lading. * * *

* * * * * * *

3. Section 10.62 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 10.62 Bunker fuel oil.

(a) *Withdrawal under section 309, Tariff Act of 1930, as amended (19 U.S.C. 1309).* Except as otherwise provided in § 10.62b, relating to withdrawals from warehouse of aircraft turbine fuel to be used within 30 days of such withdrawal as supplies on aircraft under section 309, Tariff Act of 1930, as amended (19 U.S.C. 1309), when all the bunker fuel oil in a Customs bonded tank is intended only for lading duty free as supplies on vessels under section 309 at the port where the tank is located, delivery of the oil, by Customs bonded carrier, cartman, or lighterman (including bonded pipelines), under withdrawals on Customs Form 7506, either single or blanket, may be made without the presence of a Customs officer. * * *

* * * * * * *

4. Section 10.62b is added to read as follows:

§ 10.62b Aircraft turbine fuel.

(a) *General.* Unless otherwise provided, aircraft turbine fuel withdrawn from a Customs bonded warehouse for use under section 309, Tariff Act of 1930, as amended (19 U.S.C. 1309), may be commingled with domestic or other aircraft turbine fuel after such withdrawal only if such commingling is approved by the appropriate Customs official for the port where the commingling occurs. The appropriate Customs official may approve such commingling if the fueling system in which the commingling will occur contains adequate physical safeguards to prevent the possible unauthorized entry into the Customs territory of the bonded fuel. Such commingled fuel must be accounted for in the same 24-hour period in which it was commingled and must be—

(1) exported within that 24-hour period;

(2) used under section 309 within that 24-hour period; or

(3) entered or withdrawn for consumption, with duty deposited, as required under the applicable regulations (see part 144 of this chapter).

(b) *Duty-free withdrawal from warehouse of aircraft turbine fuel under section 557(a), Tariff Act of 1930, as amended (19 U.S.C. 1557(a)).* Turbine fuel intended for use as supplies on aircraft under section 309,

Tariff Act of 1930, as amended, and withdrawn from a Customs bonded warehouse shall be entitled to the privileges provided for in section 309 if an amount equal to or exceeding the quantity of such fuel is established, as provided for in paragraph (c) of this section, to have been used on aircraft qualifying for the privileges provided for in section 309 within 30 days after the withdrawal of the fuel from the Customs bonded warehouse. Withdrawal of aircraft turbine fuel under this paragraph shall be in accordance with the procedures in §§ 10.59 through 10.64, unless otherwise provided in this section. Withdrawals under this paragraph shall be annotated with the term "Withdrawal under 19 CFR 10.62b(b)".

(c) *Establishment of use of fuel by qualifying aircraft.*

(1) The person withdrawing aircraft turbine fuel under paragraph (b) of this section shall establish that an aircraft qualifying for the privileges provided for in section 309, Tariff Act of 1930, as amended, used fuel in an amount equal to or exceeding the quantity of the fuel withdrawn which is not entered and upon which duties are not paid by submitting to Customs, within the time provided in paragraph (d) of this section, either—

(i) Records prepared in the normal course of business effecting the transfer to identified *(e.g.,* by aircraft company name, flight number, flight origin and destination, and date of flight) aircraft of fuel in an amount equal to or exceeding the quantity of the fuel withdrawn which is not entered and on which duties are not paid and objective evidence that the aircraft to which the fuel was transferred were actually used in trade qualifying for the privileges provided in section 309, Tariff Act of 1930, as amended; or

(ii) A certification (documentary or electronic) that:

(A) All of the fuel withdrawn was intended for use on aircraft entitled to the privileges provided for in section 309;

(B) Within 30 days of the date of withdrawal from warehouse, an amount of fuel equal to or exceeding the quantity of the fuel withdrawn which is not entered and on which duties are not paid was transferred as supplies to aircraft entitled to the privileges provided for in section 309;

(C) All of the aircraft, to which the fuel which is not entered and on which duties are not paid was transferred as supplies, were used in a trade provided for in section 309; and

(D) The person making the certification possesses evidence (documentary or electronic) available for Customs inspection at a named place which supports each of the above statements.

(2) Upon request by Customs, the person who submits the certification provided for in paragraph (c)(1) of this section shall promptly provide the evidence required to support the claim for treatment under this section (including the records described in § 10.62b(c)(1)(i)) and §§ 10.62 and 19.6(d) and each of the statements in the certification.

(d) *Time for establishment of use of fuel by qualifying aircraft.* The person withdrawing aircraft turbine fuel under paragraph (b) of this

section shall submit the records or certification provided for in paragraph (c) of this section by the 40th day after the date of withdrawal of the fuel unless the fuel was withdrawn under a blanket withdrawal under paragraph (g) of this section. If the fuel was withdrawn under a blanket withdrawal, the person withdrawing aircraft turbine fuel under this section shall submit the records or certification provided for in paragraph (c) of this section by the 40th day after all of the fuel covered by the blanket permit to withdraw has been withdrawn.

(e) *Treatment of turbine fuel withdrawn but not used on qualifying aircraft within 30 days.* If turbine fuel is withdrawn from a Customs bonded warehouse under paragraph (b) of this section but fuel in an amount less than the quantity withdrawn is established to have been used within 30 days of the date of withdrawal from warehouse on aircraft qualifying for the privileges provided for in section 309, Tariff Act of 1930, as amended, a withdrawal for consumption shall be filed and duties shall be deposited for the excess of fuel so withdrawn over that used on aircraft so qualifying. Such withdrawal shall be filed and such duties shall be deposited by the 40th day after the date of withdrawal of the fuel in accordance with the procedures in § 144.38 of this chapter. Interest shall be payable and deposited with such duties, calculated from the date of withdrawal at the rate of interest established under 26 U.S.C. 6621.

(f) *Liquidated damages.* Failure to account for turbine fuel withdrawn under paragraphs (b) through (h) of this section shall result in liquidated damages against the person withdrawing the turbine fuel, as provided for under § 113.62 of this chapter. Such failure to account for turbine fuel includes:

(1) The failure to timely file the withdrawal for consumption and payment of duty, with interest, on the quantity of fuel so withdrawn in excess of the quantity of fuel established to have been used on qualifying aircraft within 30 days of withdrawal, as provided for in paragraph (e) of this section;

(2) The failure to timely file the evidence or certification establishing such use of the fuel which is not entered and on which duties are not paid, as provided for in paragraph (c) of this section; or

(3) The failure to promptly provide the evidence required to support the claim for treatment under paragraph (b) of this section, upon request by Customs, as provided for in paragraph (c)(2) of this section.

(g) *Blanket withdrawals.* Blanket withdrawals, as provided for in §§ 10.62 and 19.6(d), may be used for withdrawals from warehouse under section 557(a), Tariff Act of 1930, as amended, and paragraphs (b) through (h) of this section, under the procedures provided in §§ 10.62 and 19.6(d) except that—

(1) Application by the withdrawer for a blanket permit to withdraw shall be on the warehouse entry, or on the warehouse entry/entry summary when used as an entry, annotated with the words "Some or all of

the merchandise will be withdrawn under blanket permit per §§ 10.62, 10.62b, and 19.6(d).";

(2) Turbine fuel withdrawn under a blanket permit as authorized in this paragraph may be delivered at a port other than the port of withdrawal;

(3) Customs acceptance of a properly completed application for a blanket permit to withdraw, on the warehouse entry or warehouse entry/entry summary, will constitute approval of the blanket permit to withdraw;

(4) A copy of the approved blanket permit to withdraw will be delivered to the warehouse proprietor, whereupon fuel may be withdrawn under the terms of the blanket permit;

(5) The withdrawal document to be placed in the proprietor's permit file folder (see § 19.6(d)(2)) will be a commercially acceptable document of receipt (such as a "withdrawal ticket") issued by the warehouse proprietor, identified with a unique alpha-numeric code and containing the following information:

(i) Identity of withdrawer;

(ii) Identity of warehouse and tank from which fuel is withdrawn;

(iii) Date of withdrawal;

(iv) Type of merchandise withdrawn; and

(v) Quantity of merchandise withdrawn.

(6) The date of withdrawal, for purposes of calculating the 30-day period in which fuel must be used on qualifying aircraft under this section, shall be the date on which physical removal of the fuel from the warehouse commences;

(7) The blanket permit summary prepared by the proprietor as provided for in § 19.6(d)(4) shall be prepared when all of the fuel covered by the blanket permit has been withdrawn and shall account for all merchandise withdrawn under the blanket permit, as required by § 19.6(d)(4), by stating, in summary form, the unique alpha-numeric codes and information required in paragraphs (5) of this section, as well as the identity of the warehouse entry to which the withdrawal is attributed;

(8) The certification on the blanket permit summary (see § 19.6(d)(4)) shall be that the merchandise listed thereunder was withdrawn in compliance with §§ 10.62, 10.62b, and 19.6(d); and

(9) The person withdrawing aircraft turbine fuel under these blanket procedures shall submit the records or certification provided for in § 10.62b(c) by the 40th day after all of the fuel covered by the blanket permit has been withdrawn (see § 10.62b(d)). At the discretion of the port director for the port where blanket withdrawal was approved, submission of the records and evidence required to establish use of the fuel on qualifying aircraft may be required to be submitted electronically, in a format compatible with Customs electronic record-keeping systems.

(h) *Recordkeeping.* The person withdrawing aircraft turbine fuel from warehouse under this section is subject to the recordkeeping

requirements in 19 U.S.C. 1508 and 1509, as provided for in part 162 of this chapter.

PART 18—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

1. The general authority for part 18 is revised to read, and specific authority for new § 18.31 is added, as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 20, HTSUS), 1551, 1552, 1553, 1624;

* * * * * * *

§ 18.31 also issued under 19 U.S.C. 1553a.

2. Section 18.1 is amended by revising the second sentence of paragraph (a)(1) to read as follows:

§ 18.1 Carriers, application to bond.

(a)(1) * * * For the purposes of this section, the term "common carrier" means a common carrier of merchandise owning or operating a railroad, steamship, pipeline, or other transportation line or route. * * *

* * * * * * *

3. Part 18 is amended by adding a center heading and new § 18.31, following § 18.27, to read as follows:

MERCHANDISE TRANSPORTED BY PIPELINE

§ 18.31 Pipeline transportation of bonded merchandise.

(a) *General.* Merchandise may be transported by pipeline under the procedures in this part, as appropriate and unless otherwise specifically provided for in this section.

(b) *Bill of lading to account for merchandise.* Unless Customs has reasonable cause to suspect fraud, Customs shall accept a bill of lading or equivalent document of receipt issued by the pipeline operator to the shipper and accepted by the consignee to account for the quantity of merchandise transported by pipeline and to maintain the identity of the merchandise.

(c) *Procedures when pipeline is only carrier.* When a pipeline is the only carrier of bonded merchandise and there is no transfer to another carrier, the bill of lading or equivalent document of receipt issued by the pipeline operator to the shipper shall be included with, and made a part of, the Customs in-bond document (see § 18.2(b)). If there are no discrepancies between the bill of lading or equivalent document of receipt and the other documents making up the in-bond manifest for the merchandise, and provided that Customs has no reasonable cause to suspect fraud, the bill of lading or equivalent document of receipt shall be accepted by Customs at the port of destination or exportation (see §§ 18.2(d) and 18.7) as establishing the quantity and identity of the merchandise transported. The pipeline operator shall be responsible for any discrepancies, including shortages, irregular deliveries, or nondeliveries at the port of destination or exportation (see § 18.8).

(d) *Procedures when there is more than one carrier (i.e., transfer of the merchandise).*

(1) *Pipeline as initial carrier.* When a pipeline is the initial carrier of bonded merchandise and the merchandise is transferred to another conveyance (either a different mode of transportation or a pipeline operated by another operator), the procedures in § 18.3 and paragraph (c) of this section shall be followed, except that—

(i) when the merchandise is to be transferred to one conveyance, a copy of the bill of lading or equivalent document issued by the pipeline operator to the shipper shall be delivered to the person in charge of the conveyance for delivery, along with the in-bond document, to the appropriate Customs official at the port of destination or exportation; or

(ii) when the merchandise is to be transferred to more than one conveyance, a copy of the bill of lading or equivalent document issued by the pipeline operator to the shipper shall be delivered to the person in charge of each additional conveyance, along with the two additional copies of the in-bond document, for delivery to the appropriate Customs official at the port of destination or exportation.

(2) *Transfer to pipeline from initial carrier other than a pipeline.* When bonded merchandise initially transported by a carrier other than a pipeline is transferred to a pipeline, the procedures in § 18.3 and paragraph (c) of this section shall be followed, except that the bill of lading or other equivalent document of receipt issued by the pipeline operator to the shipper shall be delivered, along with the in-bond document, to the appropriate Customs officer at the port of destination or exportation.

(3) *Initial carrier liable for discrepancies.* In the case of either paragraph (d)(1) or (d)(2) of this section, the initial carrier shall be responsible for any discrepancies, including shortages, irregular deliveries, or nondeliveries, at the port of destination or exportation (see § 18.8).

(e) *Recordkeeping.* The shipper, pipeline operator, and consignee are subject to the recordkeeping requirements in 19 U.S.C. 1508 and 1509, as provided for in part 162 of this chapter.

PART 113—CUSTOMS BONDS

1. The general authority for part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

2. Section 113.62 is amended by revising paragraph (b) introductory text to read as follows:

§ 113.62 Basic importation and entry bond conditions.

* * * * * * *

(b) *Agreement to Make or Complete Entry.* If all or part of imported merchandise is released before entry under the provisions of the special delivery permit procedures under 19 U.S.C. 1448(b), released before completion of the entry under 19 U.S.C. 1484(a), or withdrawn from warehouse under 19 U.S.C. 1557(a) (see § 10.62b of this chapter), the

principal agrees to file within the time and in the manner prescribed by law and regulation, documentation to enable Customs to: * * *

* * * * * * *

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: October 4, 1995.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, February 22, 1996 (61 FR 6772)]

(T.D. 96–19)

REQUEST FOR PUBLIC COMMENTS CONCERNING DISSEMINATION OF EXISTING INFORMATION PRODUCT AND ELIMINATION OF MICROFICHE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice, request for public comments.

SUMMARY: The U.S. Customs Service provides rulings and publications on a variety of subjects for the guidance of the importing public. The rulings have been available in the past in a variety of formats, including printed media, diskette and microfiche. The Customs Service would like to provide these rulings, future publications and additional information in two new formats (CD-ROM and the Internet) with built-in search capabilities and "hypertext" links. In addition, the Customs Service would like to receive public comments on the elimination of one format used to supply rulings to the public by subscription(microfiche). This document invites public comment on the various proposals.

DATES: Comments must be submitted by March 25, 1996.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, U. S. Customs, Franklin Court, 1301 Constitution Avenue, NW, Washington, DC 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations & Rulings, Franklin Court, 1099 14th Street, NW, Suite 4000W, Washington, DC.

FOR FURTHER INFORMATION CONTACT:

For contents and technical aspects of the CD-ROM: Howard Plofker 202–482–7077.
For the Internet: Kathy Davis 202–927–0255.
For the microfiche: Thomas Budnik 202–482–6909.

SUPPLEMENTARY INFORMATION:

In accordance with OMB Circular A–130 and Section 2 of the Paperwork Reduction Act of 1995 (Pub.L. 104–13, 44 U.S.C. 3506(d)), Customs is soliciting comments from the public on the dissemination of Customs information by CD-ROM (Compact Disc-read only memory) and the Internet and the elimination of microfiche rulings. In the past, the U. S. Customs Service has, pursuant to section 103.4, Customs Regulations (19 CFR 103.4), made its rulings available to the importing community. These rulings have been available in microfiche format, and in ASCII text format on 3.5″ and 5.25″ diskettes, on an annual subscription basis. They have also been available through a variety of private subscription services, which obtain the rulings from Customs.

CD-ROM

The New York and Headquarters rulings available in an electronic format now number approximately 23,000 rulings and take up a considerable amount of hard disk drive space when loaded on a PC or network. Over the past two years, Customs Office of Regulations & Rulings converted its internal electronic rulings (which had been distributed to the public on diskette, by subscription) into the Folio VIEWS ® Infobase format. This format compresses the file size and indexes the records in a file. It has extensive search and query capabilities and is frequently used to disseminate legal and government publications. Customs has also converted the Harmonized Tariff Schedules, Title 19 of the Code of Federal Regulations, Title 19 of the U.S. Code, the Valuation Encyclopedia and other documents into this format for internal use.

Last July, the Office of Finance, in partnership with the Offices of Regulations & Rulings and Strategic Trade, began producing an in-house CD-ROM for Customs officers which contained those infobases together with other material. Since that time, material from other Customs offices has been added. This CD-ROM is prepared monthly for dissemination to Customs field offices. The internal CD-ROM utilizes the Windows version of Folio Views® 3.1. Each CD-ROM disk can hold approximately 650 MB of material. The infobases contain "hypertext" jump links so that a researcher who sees a reference to another ruling, a regulation or statute cited within a ruling may "double-click" on the reference and bring up the referenced document, if it is on the CD-ROM. Documents or portions of documents may be cut, copied and pasted to other Windows applications, such as word processors, or printed. Many members of the public who have seen the system in use have recommended that it be made available to the public. Because some of the material on the Customs internal CD-ROM is copyrighted, proprietary or for internal use, that material cannot be distributed to the public.

The Customs Service agrees that in accordance with the "informed compliance" mandate contained in the legislative history of the Customs Modernization Act (Title VI, Public Law 103–182) the broadest dissemination possible should be made of this material. Customs seeks

public comment on dissemination of the rulings and related material in a CD-ROM format. Customs would like to offer the CD-ROM in the Folio Views® format, since that format is being used for internal dissemination and minimal additional costs would be incurred in preparing a public version. Customs would include the licensing fee for the program in the price of the CD-ROM. It is expected that CD-ROMs would be offered on an annual subscription basis with an estimated cost of approximately $240–300 per year for 10–12 CD-ROMs.

It is anticipated that the initial CD-ROMs would contain all the rulings available in electronic format (including all Headquarters Rulings and New York Rulings previously available on diskette). The rulings on CD-ROMs will be cumulative, unlike the current diskette services. In addition the initial CD-ROM will contain 19 CFR, 19 U.S.C., the Harmonized Tariff Schedules of the U.S., and the Valuation Encyclopedia. It is hoped that future CD-ROMs will contain various Informed Compliance publications and other material of interest to the importing and exporting community. The CD-ROMs would contain a small "Infobase Manager" program which would be installed on the PC s harddrive. The infobases themselves would remain on the CD-ROM, thereby conserving hard drive space. When a new CD-ROM is issued, the old one could be removed, since the CD-ROMs are cumulative. If this proposal is adopted, the first CD-ROMs would be available for the public in the Spring. An alternative to the above would be to provide the infobases on the CD-ROM without a program to run them. This would require the subscriber to purchase Folio Views® 3.1 from the Folio Corporation or an authorized reseller. A second alternative would be to put the ASCII (plain, un-indexed text) files containing the rulings and some other material or WordPerfect files on a CD-ROM without any indexing or hypertext program. Customs does not believe that this alternative will be as useful to the vast majority of users since the files will be uncompressed and unindexed and a search program will have to be purchased from another supplier.

Customs would encourage the broadest possible dissemination of the material contained on the CD-ROM infobases and would invite electronic publishers to add material on any commercial redistribution of the infobases. Customs also invites the public to identify the type of materials it would like to see on the CD-ROM.

INTERNET

Customs also proposes placing publications and other information of interest to the public on the Internet. Customs is considering including the CD-ROM infobases described above on the Internet where users could access, and search the material without charge. The public is invited to comment on these proposals and identify other documents and material which the public believes should be made available on the Internet. Public accessibility to the Customs material on the Internet is anticipated for late Spring, 1996.

MICROFICHE

For many years, Customs made microfiche copies of rulings available to the public by annual subscription. The production of microfiche is an expensive and time consuming process compared to the preparation and production of electronic rulings, which is a by-product of writing the ruling itself. The number of microfiche subscribers has been declining since the diskette subscription services were introduced. Customs expects to eliminate the microfiche service effective October, 1996, the beginning of the fiscal year. However, if sufficient public interest exists in continuing the microfiche rulings, Customs may reconsider this decision. However, it is anticipated that subscription prices will have to be increased dramatically to continue the microfiche.

COMMENTS

Customs requests comments on implementation of the CD-ROM project and the Internet project and elimination of the microfiche rulings. Persons wishing to comment on any of these projects should send their comments to the Regulations Branch, Office of Regulations & Rulings, U.S. Customs Service, 1301 Constitution Avenue NW, Washington, DC 20229. Comments may be reviewed at the Regulations Branch, Office of Regulations and Rulings, Suite 4000W, 1099 14th Street, Washington, DC 20005 during the hours of 9:30 a.m. and 4:00 p.m.

Dated: February 14, 1996.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register February 22, 1996 (61 FR 6892)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, February 14, 1996.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF KEYBOARD/PANEL SWITCHES, ELASTOMERS AND SWITCH ASSEMBLIES FOR TELEPHONES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking four rulings relating to the tariff classification of keyboard/panel switches, elastomers and switch assemblies for telephones. These articles are used to make electrical connections with the printed circuit boards in mobile telephone systems to allow calls to be made. Notice of the proposed revocations was published on January 3, 1996, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after April 29, 1996.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 31, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 1, proposing to revoke *HQ* 089938, dated March 11, 1992, *HQ* 088964, dated July 23, 1991, *HQ* 087362, dated February 19, 1991, and *NY* 863577, dated June 20, 1991. These rulings classified keyboard/panel switches, elastomers and switch assemblies for telephones as parts suitable for use solely or principally for use with with the apparatus of heading 8525, in subheading 8529.90.30, Harmonized Tariff Schedule of the United States (HTSUS), and in subheading 8517.90.30, HTSUS, as parts of electrical apparatus for line telephony, telephone sets.

The only comment received in response to this notice favored the proposal. The commenter notes that the merchandise in issue is plainly described by the language of heading 8537, and that neither the heading text nor the Harmonized Commodity Description and Coding System Explanatory Notes contains limiting language that reduces the scope of heading 8537 to encompass only large scale equipment.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking *HQ* 089938, *HQ* 088964, *HQ* 087362, and *NY* 863577, to reflect the proper classification of keyboard/panel switches, elastomers and switch assemblies for telephones in subheading 8537.10.90, HTSUS, as boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of headings 8535 or 8536. The rate of duty under this provision is 4.8 percent *ad valorem*. *HQ* 958711, revoking *HQ* 089938 and *NY* 863577, is set forth as Attachment "A" to this document, *HQ* 958709, revoking *HQ* 087362, is set forth as Attachment "B" to this document, and *HQ* 958708, revoking *HQ* 088964, is set forth as Attachment "C" to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: February 6, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 6, 1996.

CLA–2 RR:TC:MM 958711 JAS
Category: Classification
Tariff No. 8537.10.90

MS. JOAN MCLEOD
NORTHERN TELECOM INC.
77 Oriskany Drive
Tonawanda, NY 14150

Re: *NY* 863577, *HQ* 089938 revoked; elastomer, klik key rubber switch, electrical apparatus for completing electric circuits; switches, Heading 8536; electrical insulators, Heading 8546; bases for electric control or distribution of electricity, Heading 8537, *Nidec Corporation v. U.S.*, Section XVI, Note 2.

DEAR MS. MCLEOD:

In *NY* 863577, dated June 20, 1991, the Area Director of Customs, New York Seaport, responded to your request of May 16, 1991, and advised you that a molded silicone rubber pad with collapsible protrusions or domes, referred to as an elastomer or a Klik Key Rubber Switch, was classifiable in subheading 8517.90.30, Harmonized Tariff Schedule of the United States (HTSUS), as parts of telephone sets. In *HQ* 089938, issued to you on March 11, 1992, we confirmed the holding in *NY* 863577.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *HQ* 863577 and *HQ* 089936 was published on January 3, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 1. The one comment received in response to this notice favored the proposal. The commenter noted that the merchandise in issue is plainly described by the language of heading 8537, and that neither the heading text nor the Harmonized Commodity Description and Coding System Explanatory Notes contains limiting language that reduces the scope of heading 8537 to encompass only large scale equipment.

Facts:

The elastomer or Klik Key Rubber Switch, is described in *HQ* 089938 as a silicone rubber pad with collapsible protrusions or domes. The rubber acts as an insulating material while the domes contain conductive rubber contacts and function as individual switches that move under finger pressure to complete an electrical circuit between the keys and the switch board of a telephone. An examination of a sample submitted in connection with the request for reconsideration indicated it was designed for use with telephone sets.

The provisions under consideration are as follows:

8517	Electrical apparatus for line telephony or telegraphy, including such apparatus for carrier-current line systems; parts thereof:
8517.90	Parts:
	Other parts, incorporating printed circuit assemblies:
8517.90.12	Parts for telephone sets * * * 8.5 percent
* * * * * * *	
8537	Boards, panels (including numerical control panels), consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity * * *:
8537.10	For a voltage not exceeding 1,000 V:
8537.10.90	Other * * * 4.8 percent

Issue:

Whether the elastomer is a good included in heading 8537.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in

part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the notes should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Subject to certain exceptions that are not relevant here, goods that are identifiable parts of machines or apparatus of Chapter 84 or Chapter 85 are classifiable in accordance with Section XVI, Note 2, HTSUS. **Nidec Corporation v. United States,** 861 F. Supp. 136, *aff'd*, 68 F.3d 1333 (1995). Parts which are goods included in any of the headings of Chapters 84 and 85 are in all cases to be classified in their respective headings. *See* Note 2(a). Other parts, if suitable for use solely or principally with a particular machine, or with a number of machines of the same heading, are to be classified with the machines of that kind. *See* Note 2(b).

It was stated on p. 3 of *HQ* 089938 that the subject elastomer does not satisfy the terms of heading 8537. It is used solely or principally with telephone sets. while we agree with the second statement, we disagree that the elastomer is not a good included in heading 8537. Relevant **ENs** at p. 1391, state that the goods of heading 85.37 consist of an assembly of apparatus of the kind referred to in headings 85.35 and 85.36 (e.g., switches and fuses) on a board, panel, console, etc., or mounted in a cabinet, desk, etc., for electric control or distribution of electricity. The elastomer in issue consists of collapsible protrusions or domes on a rubber pad, each dome constituting a switch, and each containing a conductive rubber contact. The elastomer meets the description in heading 8537 as a base equipped with two or more apparatus of headings 8535 or 8536 (i.e., switches) for electric control or the distribution of electricity, as required by Section XVI, Note 2(a), HTSUS.

Holding:

Under the authority of GRI 1, the elastomer or Klik Key Rubber Switch is provided for in heading 8537. It is classifiable in subheading 8537.10.90, HTSUS.

NY 863577, dated June 20, 1991, and *HQ* 089938, dated March 11, 1992, are hereby revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
Washington, DC, February 6, 1996.

CLA–2 RR:TC:MM 958709 JAS
Category: Classification
Tariff No. 8537.10.90

GEORGE KLEINFELD, ESQ.
PAUL, WEISS, RIFKIND, WHARTON & Garrison
1815 L Street, N.W.
Washington, DC 20036–5694

Re: *HQ* 087362 Revoked; keyboard/panel switch for cellular mobile telephone; parts of transmission apparatus for radiotelephony whether or not incorporating reception apparatus, heading 8529; bases for electric control or the distribution of electricity, Heading 8537, *Nidec Corporation v. U.S.*, Section XVI, Note 2.

DEAR MR. KLEINFELD:

This is in reference to *HQ* 087362, dated February 19, 1991, in which we replied to your inquiry on behalf of **NEC America, Inc.**, dated May 11, 1990, concerning the tariff classification of a keyboard/panel switch for cellular mobile telephones. In that ruling we confirmed that the merchandise was classifiable in subheading 8529.90.50 (now 99), Harmonized Tariff Schedule of the United States (HTSUS), a provision for other parts suitable for use solely or principally with the apparatus of headings 8525 to 8528.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat 2057, 2186 (1993), notice of, the proposed revocation of *HQ* 087362, was published on January 3, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 1. The one comment received in response to this notice favored the proposal. The commenter noted that the merchandise in issue is plainly described by the language of heading 8537, and that neither the heading text nor the Harmonized Commodity Description and Coding System Explanatory Notes contains limiting language that reduces the scope of heading 8537 to encompass only large scale equipment.

Facts:

As described in *HQ* 087362, the keyboard/panel switch, also referred to as a keyboard and a keyboard assembly, is comprised of 20 push button type switches, 14 pin type connectors, and 11 metal contacts, all affixed to a printed circuit board. After importation, the article is inserted into the logic board of a cellular mobile telephone (CMT). When a key on the CMT dialpad is depressed the keyboard/panel switch diverts an electrical signal along a certain path so that the logic circuit board assembly recognizes the path. The keyboard/panel switch enables the user to make a telephone call or to avail himself of the other functions of the CMT

The provisions under consideration are as follows:

8529	Parts suitable for use solely or principally with the apparatus of headings 8525 to 8528:
8529.90	Other
8529.90.99	Other * * * 4.7 percent
* * * * * * *	
8537	Boards, panels (including numerical control panels), consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity * * *:
8537.10	For a voltage not exceeding 1,000 V:
8537.10.90	Other * * * 4.8 percent

Issue:

Whether the keyboard/panel switch is a good included in heading 8537.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in

part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **EN,** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the notes should always be consulted. *See* T. D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Subject to certain exceptions that are not relevant here, goods that are identifiable as parts of machines or apparatus of Chapter 84 or Chapter 85 are classifiable in accordance with Section XVI, Note 2, HTSUS. **Nidec Corporation v. United States,** 861 F. Supp. 136, *aff'd.* 68 F. 3d 1333 (1995). Parts which are goods included in any of the headings of Chapters 84 and 85 are in all cases to be classified in their respective headings. *See* Note 2(a). Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading, are to be classified with the machines of that kind. *See* Note 2(b).

As explained on p. 2 of *HQ* 087362, when the user depresses a key on the CMT keypad, the keyboard/panel switch diverts an electrical signal along a path so that the logic board of the CMT recognizes the key typed. It was concluded that the keyboard/panel switch was not described by the terms of heading 8537. We disagree. Relevant ENs at p. 1391, state that the goods of heading 85.37 consist of an assembly of apparatus of the kind referred to in headings 85.35 and 85.36 (e.g., switches and fuses) on a board, panel, console, etc., or mounted in a cabinet, desk, etc. The keyboard/panel switch in issue contains multiple switches, together with connectors and contacts, and functions by closing an electronic loop that switches an electric signal to the appropriate port on the CMT logic board. It meets the description in heading 8537 as a base for electric control or the distribution of electricity, as required by Section XVI, Note 2(a), HTSUS.

Holding:

Under the authority of GRI 1, the keyboard/panel switch is provided for in heading 8537. It is classifiable in subheading 8537.10.90, HTSUS.

HQ 087362, dated February 19, 1991, is hereby revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 6, 1996.

CLA–2 RR:TC:MM 958708 JAS
Category: Classification
Tariff No. 8537.10.90

MR. J. G. BRADFORD
AT&T
Guilford Center, P.O. Box 2500
Greensboro, NC 27420–5000

Re: *HQ* 088964 Revoked; membrane switch assembly, keypad with two flexible membrane circuits having carbon ink circuitry printed on them, paper spacers and plastic graphics; parts of electrical apparatus for line telephony or telegraphy, Heading 8517; touch operated switch for making/breaking electric contact in multiline telephone systems, *Nidec Corporation v. U.S.*, Section XVI, Note 2.

DEAR MR. BRADFORD:

In *HQ* 088964, dated July 23, 1991, we responded to your letter of February 25, 1991, and advised that a membrane switch assembly for muitiline telephone sets was classifiable in subheading 8517.90.30, Harmonized Tariff Schedule of the United States (HTSUS), as parts of electrical apparatus for line telephony or telegraphy, telephone sets.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 107–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification/revocation of *HQ* 088964 was published on January 3, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 1. The one comment received in response to this notice favored the proposal. The commenter noted that the merchandise in issue is plainly described by the language of heading 8537, and that neither the heading text nor the Harmonized Commodity Description and Coding System Explanatory Notes contains limiting language that reduces the scope of heading 8537 to encompass only large scale equipment.

Facts:

Switch assemblies come in various configurations and are often used with printed circuit boards to connect circuits in telephones, computer keyboards, calculators, and children's games. The membrane switch assembly which is the subject of this inquiry is described in *HQ* 088964 as usually including two flexible membrane circuits, adhesive paper spacers, plastic graphics, and in some variations, molded plastic housings or backplates. The flexible membranes have a carbon ink circuitry printed on them. The switches are assembled in layers and bonded with the self-contained adhesive of the spacers and graphics. The switches vary in size from 2 inches to 8 inches in width and from 4 inches to 18 inch in length, including insertible tails (electrical connectors).

The provisions under consideration are as follows:

8517	Electrical apparatus for line telephony or telegraphy, including such apparatus for carrier-current line systems; parts thereof:
8517.90	Parts:
	Other parts, incorporating printed circuit assemblies:
8517.90.12	Parts for telephone sets * * * 8.5 percent
* * * * * * *	
8537	Boards, panels (including numerical control panels), consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity * * *:
8537.10	For a voltage not exceeding 1000 V:
8537.10.90	Other * * * 4.8 percent

Issue:

Whether the membrane switch assembly is a good included in heading 8537.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of interpretation (GRIs). GRI 1 states in

part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the notes should always be consulted. *See* T.D. 89–80,54 Fed. Reg. 35127, 35128 (Aug. 23,1989).

Subject to certain exceptions that are not relevant here, goods that are identifiable parts of machines or apparatus of Chapter 84 or Chapter 85 are classifiable in accordance with Section XVI, Note 2, HTSUS. **Nidec Corporation v. United States,** 861 F. Supp. 136, *aff'd.* 68 F. 3d 1333 (1995). Parts which are goods included in any of the headings of Chapters 84 and 85 are in all cases to be classified in their respective headings. *See* Note 2(a). Other parts, if suitable for use solely or principally with a particular machine, or with a number of machines of the same heading, are to be classified with the machines of that kind. *See* Note 2(b).

HQ 088964 cited with approval *United States v. General Electric Company,* 441 F. 2d 1186, 58 CCPA 152, C.A.D. 1021 (1971). This case, decided under the HTSUS predecessor tariff code, the Tariff Schedules of the United States (TSUS), held that item 685.90, TSUS—the predecessor provision of heading 8537—was not a "specific" provision for purposes of General Interpretative Rule 10(ij), TSUS. Under Rule 10(ij), a parts provision shall not prevail over a specific provision. This case was believed to be instructive in interpreting the provisions of heading 8537. Initially, we note that the phraseology of item 685.90 and that of heading 8537 are similar but not identical, so that whether *General Electric* is instructive as to the scope of heading 8537 is unclear. Moreover, Section XVI, Note 2(a) does not require that heading of Chapter 84 or Chapter 85 be specific; the heading need merely *include* the good in issue. It is our opinion that the switch membrane assembly is a good included in heading 8537. The use of dial keypads or function keys for telephone sets, goods substantially similar to the membrane switch assembly in issue, involves depressing a key on a keypad to divert an electrical signal so that a printed wiring board (PWB) in the telephone recognizes the key typed. This essentially joins two ends of the electrical path on the PWB, completing an electrical circuit.

Relevant **ENs** at p. 1391, state that the goods of heading 85.37 consist of an assembly of apparatus of the kind referred to in headings 85.35 and 85.36 (e.g., switches and fuses) on a board, panel, console, etc., or mounted in a cabinet, desk, etc., for electric control or distribution of electricity. The membrane switch assembly in issue consists of individual switches bonded together in layers. It meets the description in heading 8537 as a base equipped with two or more apparatus of headings 8535 or 8536 (i.e., switches) for electric control or the distribution of electricity, as required by Section XVI, Note 2(a), HTSUS.

Holding:

Under the authority of GRI 1, the membrane switch assembly is provided for in heading 8537. It is classifiable in subheading 8537.10.90, HTSUS.

HQ 088964, dated July 23, 1991, is hereby revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A COORDINATE MEASURING MACHINE (CMM)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a coordinate measuring machine (CMM). Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before March 29, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Robert Altneu, Attorney-Advisor, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a coordinate measuring machine.

In HQ 953312, issued on June 17, 1993, by Customs Headquarters, the VA series coordinate measuring machines (CMMs) were classified under subheading 9031.40.00 (now subheading 9031.49.40), Harmonized Tariff Schedule of the United States (HTSUS), which provides for optical measuring or checking instruments. HQ 953312 is set forth in "Attachment A" to this document.

Subsequent information has been provided indicating that the optical elements contained in the VA series CMMs are for a subsidiary purpose. Customs is now of the opinion that the merchandise is classifiable under subheading 9031.80.00, HTSUS, which provides for other measuring or checking instruments.

Customs intends to revoke HQ 953312 to reflect the proper classification of the VA series CMM's under subheading 9031.80.00, HTSUS. Before taking this action, consideration will be given to any written comments timely received. Proposed HQ 958886 revoking HQ 953312 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: February 12, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 17, 1993.

CLA–2 CO:R:C:M 953312 MMC
Category: Classification
Tariff No. 9031.40.00

MR. GREG SEBASTIAN, MANAGER
FINANCE AND ADMINISTRATION
TOKYO SEIMITSU AMERICA, INC.
39205 Country Club Drive, Suite C–22
Farmington Hills, MI 48331

Re: Coordinate measuring machine; additional U.S. Note 3 to Chapter 90, EN 90.31.

DEAR MR. SEBASTIAN:

This is in response to your letter of 1/22/93 requesting classification of a VA series Coordinate Measuring Machine (CMM) under the Harmonized Tariff Schedule of the United States (HTSUS). A brochure which depicts the article and contains a description, written in Japanese, of the machine's function was submitted. An additional brochure was submitted which provides an English explanation of the PA series CMM, which, according to your letter, functions similarly to the VA series. We were telephonically advised that the computer, disc drives, printers, and CRT's will not be imported with the CMM.

Facts:

A CMM determines if a particular article's dimensions are the same as the article's original design. It does this by calculating an article's coordinates on a given surface area of the machine. When measuring a particular article, the CMM in question uses moire fringe scales. These scales are interfaced with computers and are used to determine a particular article's contact point with the CMM. The contact point is read digitally as coordinates in space through moire fringe scales.

Moire fringe scales are reflective. They contain two sections of optical diffraction grating which have a precisely known number of lines per inch. They are made of either glass or polished stainless steel.

When two sections of optical diffraction grating are superimposed with the gratings at a slight angle to each other, a moire fringe pattern is created. When a beam of light is projected through or reflected from this field, the relative movement of one line between the two index gratings will cause the field to go through a complete cycle of light intensity. A

photoelectric cell measures the light across this field and converts the changes in light intensity into fluctuations in voltage.

Issue:

Is the VA series CMM an optical measuring or checking instrument?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's), taken in order. GRI 1, HTSUS, states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes.

Heading 9031 of Chapter 90, HTSUS, provides for measuring or checking instruments. In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be consulted. The Explanatory Notes (EN), although not dispositive, are to be used to determine the proper interpretation of the HTSUS. 54 Fed. Reg. 35127, 35128, (August 23, 1989). EN 90.31, p. 1530, states in pertinent part:

> (I) Measuring or Checking Instruments, Appliances and Machines
>
> These include:
>
> * * * (15) **Multidimensional measuring equipment,** including **Coordinate Measuring Machines** (CMMs) used to perform dimensional checks, either manually or mechanically, on various components or parts of machines.

EN 90.31 clearly states that the article under consideration is classifiable in heading 9031, HTSUS. However, whether the CMM is an optical instrument must be determined.

Additional U.S. Note 3 to Chapter 90, HTSUS, defines optical instruments as follows:

> For the purposes of this chapter, the terms *"optical appliances"* and *"optical instruments"* refer only to those appliances and instruments which incorporate one or more optical elements, but do not include any appliances or instruments in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose.

The CMM incorporates optical diffraction gratings which are optical elements. The optical diffraction grating is not used simply to view a scale or some other subsidiary purpose, but rather actually aids in measuring. Therefore, the CMM is considered an optical instrument for Chapter 90 purposes.

Subheading 9031.40.00, HTSUS, provides for [m]easuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof: [o]ther optical instruments and appliances. EN 90.31, p. 1533, states:

> [t]his subheading covers not only instruments and appliances which provide a direct aid or enhancement to human vision, but also other instruments and apparatus which function through the use of optical elements or processes.

Because the CMM utilizes optical diffraction grating to measure, it is classifiable in subheading 9031.40.00, HTSUS.

We note that several rulings issued under the Tariff Schedule of the United States (TSUS), held that CMMs were classifiable as non-optical measuring instruments under item 710.80,TSUS, the precursor to subheading 9031.80.00, HTSUS. However, the conference report to the Omnibus Trade Bill of 1988 states in pertinent part:

> [i]n light of the significant number and nature of changes in nomenclature from the TSUS to the HTSUS, decisions by the Customs Service and the courts interpreting nomenclature under the TSUS are not to be deemed dispositive in interpreting the HTSUS. H. Rep. No. 100–576, 100th Cong., 2D Sess. 548 (1988) at 559.

Under the TSUS instruments and appliances were considered optical only when they aided or enhanced human vision. However, EN 90.31 clearly states that this is not the case under the HTSUS.

Holding:

The CMM is classifiable in subheading 9031.40.00, HTSUS, with dutiable at 10% *ad valorem*.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:MM 958886 RFA
Category: Classification
Tariff No. 9031.80.00

MR. GREG SEBASTIAN, MANAGER
FINANCE AND ADMINISTRATION
TOKYO SEIMITSU AMERICA, INC.
39205 Country Club Drive, Suite C–22
Farmington Hills, MI 48331

Re: Coordinate measuring machine (CMM); optical appliances and optical instruments; measuring or checking instruments; subsidiary; Additional U.S. Note 3 to Chapter 90; HQs 088941, 950947, 952000, 954117, 954682, 955230; HQ 953312, revoked.

DEAR MR. SEBASTIAN:

This is in reference to HQ 953312, issued to you on June 17, 1993, in which Customs classified the VA series Coordinate Measuring Machine (CMM) under the Harmonized Tariff Schedule of the United States (HTSUS). In the course of ruling on similar merchandise, we have determined that HQ 953312 is incorrect.

Facts:

The VA series Coordinate Measuring Machine (CMM) determines if a particular article's dimensions are the same as the article's original design. It does this by calculating an article's coordinates on a given surface area of the machine. When measuring a particular article, the CMM in question uses moire fringe scales and an electrical mechanical probe head with a stylus. The stylus is typically a ceramic or metal shaft surmounted with a round ball which travels along the part to be measured while it is mounted on a granite table. The actual measurement occurs when the probe is triggered by touching the part being measured, which interrupts an electrical current. The probe is called an electrical-mechanical probe. The moire glass scales are interfaced with computers and are used to determine a particular article's contact point with the CMM. The contact point is read digitally as coordinates in space through moire fringe scales.

Moire fringe scales are reflective. They contain two sections of optical diffraction grating which have a precisely known number of lines per inch. They are made of either glass or polished stainless steel. When two sections of optical diffraction grating are superimposed with the gratings at a slight angle to each other, a moire fringe pattern is created. When a beam of light is projected through or reflected from this field, the relative movement of, one line between the two index gratings will cause the field to go through a complete cycle of light intensity. A photoelectric cell measures the light across this field and converts the changes in light intensity into fluctuations in voltage.

Because the moire fringe scales aided in measuring, Customs determined that the VA series CMM was classifiable under subheading 9031.40.00 (now subheading 9031.49.40), HTSUS, as optical measuring or checking instruments, in HQ 953312, issued on June 17, 1993.

Issue:

Is the VA series CMM an optical measuring or checking instrument under the HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

The following subheadings are under consideration:

9031	Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter * * *:
9031.49	Other optical instruments and appliances: [o]ther:
9031.49.40	Coordinate measuring machines * * *.

Goods classifiable under this provision have a column one, general rate of duty of 7.4 percent *ad valorem*.

9031.49.80	Other * * *. Goods classifiable under this provision have a column one, general rate of duty of 7.4 percent *ad valorem*.
9031.80.00	Other instruments, appliances and machines * * *. Goods classifiable under this provision have a column one, general rate of duty of 3.6 percent *ad valorem*.

To classify merchandise as an "optical appliance" or an "optical instrument", it must meet the requirements of Additional U.S. Note 3 to Chapter 90, HTSUS, which states that; "[f]or the purposes of this chapter, the terms *'optical appliances'* and *'optical instruments'* refer only to those appliances and instruments which incorporate one or more optical elements, but do not include any appliances or instruments in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose."

The subject CMM is provided for under heading 9031, HTSUS, as a measuring or checking instruments, appliances and machine. However, it is claimed that any optics which are contained within the system are subsidiary and that the merchandise is classifiable under subheading 9031.80.00, HTSUS, as other measuring and checking instruments.

A tariff term that is not defined in the HTSUS or in the Harmonized Commodity Description and Coding System Explanatory Notes (ENs), which constitute the official interpretation of the HTSUS, is construed in accordance with its common and commercial meaning. *Nippon Kogaku (USA) Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982).

In HQ 088941, dated January 16, 1992, Customs, citing *Webster's II New Riverside University Dictionary* (1964), p. 1155, defined "subsidiary" as "[s]erving to supplement or assist * * * [s]econdary in importance: subordinate." Customs further stated that the "[t]he meaning of 'subsidiary' has nothing to do with the amount of time optics are used in the overall use of a device, but it relates more to the type of task which the optics perform when being used in the operation of the device." *See also* HQ 955230, dated July 12, 1994.

The issue to be determined is whether the optical element (i.e., the glass moire scales) in the subject CMM are subsidiary to the actual function of measuring or checking being performed by the merchandise. In HQ 952000, dated January 28, 1993, Customs determined that the optics (i.e., a white light interferometer) contained within an automated system that performs user-defined metrology measurements on multi layer integrated product wafers, were integral to the basic function of the apparatus. Because the optics must be employed for this function, Customs concluded that the merchandise was classifiable under subheading 9031.40.90 (then 9031.40.00), HTSUS.

In HQ 954117, dated August 22, 1994, Customs determined that the Sire image Automation laser-based inspection system, which was designed to identify defects in flat homogenous products, was classifiable as an optical checking instrument under subheading 9031.40.90 (then 9031.40.00), HTSUS. The system incorporated lenses which focused its laser beam onto the surface of the products being examined, mirrors which controlled the direction of the beam and a mirrored, rotating polygon, which caused the beam to be swept across the product. The lenses, mirrors and mirrored polygon were necessary to bend, refract, etc., the laser beam in order to focus or amplify the light onto the product. The optical components of the system were not, therefore, for some subsidiary purpose, such as, viewing a scale.

In HQ 954682, dated July 14, 1994, Customs determined that an Ampoule Inspection Machine (AIM) which was designed for foreign particulate detection in glass ampoules, was also classifiable under subheading 9031.40.90 (then 9031.40.00), HTSUS. The AIM's detection system consisted of lenses and a light source reflecting through the ampoules and onto a photodiode array to detect foreign particulate. The use of the optical elements were found not to be subsidiary because without them, the AIM could not perform its function of checking.

However, in HQ 950947, dated February 25, 1992, Customs determined that a Gear Measuring Center (GMC), which was designed to measure large and heavy woodpieces, was classifiable under subheading 9031.80.00, HTSUS, as it was not an optical measuring or checking instrument. We held that the GMC's optical elements, which did not perform any measuring themselves but were used to set the location of the device's measuring slide, were for a subsidiary purpose.

The subject CMMs use a tactile probe that performs the measurement of an article. Like the optical elements in HQ 950947, the glass moire fringe scales do not perform any measuring themselves, but are used to set the location of the tactile probe. Based upon this information, we find that the optical elements are subsidiary to the function of the subject CMMs. Therefore, the subject CMMs are not optical measuring or checking instruments and should be classifiable under subheading 9031.80.00, HTSUS.

We note that this proposed revocation would cover only those CMMs that use a tactile probe and which contain optics that are not used in performing the measurement. **This ruling does not apply to all CMMs.** In determining the classification of CMMs, Customs will continue to look at the optical elements and their relation to the function that the machine or instrument is performing in determining whether the optical elements are subsidiary. *See* HQs 952000, 954682, 954117, 950947.

Holding:

The VA series CMMs are classifiable under subheading 9031.80.00, HTSUS, which provides for: "[m]easuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter * * *: [o]ther instruments, appliances and machines * * *." The column one, general rate of duty is 3.6 percent *ad valorem*.

Effect on Other Rulings:

HQ 953312, dated June 17, 1993, no longer reflects the position of Customs Service and will be revoked pursuant to section 177.9(d) of the Customs Regulations [19 CFR 177.9(d)].

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF CERTAIN LACQUERWARE ART ARTICLES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify New York Ruling Letter (NYRL) 812050, dated July 21, 1995, concerning the classification of certain lacquerware art articles.

DATE: Comments must be received on or before March 29, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Office of Regulations and Rulings, located at the Franklin Court Building, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Norman W. King, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7097.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended be section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of certain lacquerware art articles.

NYRL 812050, dated July 21, 1995, held that certain lacquerware art articles were classified as worked shell and articles thereof, in subheading 9601.90.2000, Harmonized Tariff Schedule of the United States (HTSUS). Customs intends to modify NYRL 812050, Attachment A to this document, to reflect that the proper classification in subheading 9701.90.0000, HTSUS, provided that the articles are designed for wall hangings and not utilitarian screens or rooms dividers.

Before taking this action, consideration will be given to any written comments timely received. Proposed HRL 958591K modifying NYRL 812050, and classifying the articles in subheading 9701.90.0000, HTSUS, is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: February 13, 1996.

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, July 21, 1995.

CLA–2–96:S:N:N6:344 812050
Category: Classification
Tariff No. 9601.90.2000

MR. ROBERT & DAIDONE
ROBERT & DAIDONE, P.C.
One Washington Mall—15th Floor
Boston, MA 02108

Re: The tariff classification of a seashell pictorial plaque from Vietnam.

DEAR MR. DAIDONE:

In your letter dated June 26, 1995, on behalf of Mr. Hung Tran, Hyde Park, Massachusetts, you requested a tariff classification ruling.

The submitted sample, which you refer to as lacquerware art, consists of a piece of plywood, approximately ½" thick and measuring 23½" × 15½", onto which a religious image is portrayed. The image is taken from a photograph and is crafted of seashells that have been flattened and glued into place and then painted. The whole pictorial is then lacquered. The lacquerware art can be made from any photograph at the request of a customer. The essential character of this article is derived from the seashells.

You have suggested that the lacquerware be classified under HTS # 49701.90.0000 as collages and similar decorative plaques. Based on the sample, the item is neither a collage nor a similar decorative plaque and thus not within this provision or any in Chapter 97.

The applicable subheading for the seashell pictorial plaque will be 9601.20.2000, Harmonized Tariff Schedule of the United States (HTS), which provides for Worked shell and articles thereof. The rate of duty will be 35% *ad valorem*.

Your sample is being returned as requested.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs order handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:FC 958591K
Category: Classification
Tariff No. 9701.90.00

ROBERT E. DAIDONE, ESQ.
ATTORNEY AT LAW
One Washington Mall—15th Floor
Boston, MA 02108

Re: Request for reconsideration of New York Ruling Letter (NYRL) 812050, dated July 21, 1995; lacquerware art; collages and similar decorative plaques.

DEAR SIR:

In response to your request of June 26, 1995, on behalf of your client, Mr. Hung Tran, the Customs Service issued NYRL 812050, dated July 21, 1995, which held that certain sea-

shell pictorial plagues from Vietnam, were classified in subheading 9601.90.2000, Harmonized Tariff Schedule of the United States (HTSUS) (1995), as worked shell and articles thereof, with duty at the Column 2 rate of 35 percent *ad valorem*. In your letter of September 20, 1995, you requested reconsideration of NYRL 812050 and suggested that the merchandise is classified as collages and similar decorative plaques, in subheading 9701.90.0000, HTSUS with a Column 2 free rate of duty. This is to inform you that NYRL 812050 no longer reflects the views of the Customs Service. Photographs of representative examples of the lacquerware art were submitted and are returned as requested. The sample submitted to our New York office was retained by that office and should be returned by that office as requested. The following represents the views of the Customs Service.

Facts:

The backing for the lacquerware art is composed of a piece of plywood approximately ½ inch thick which portrays an image taken from a scene or photograph. It is stated that the image, and all else, is completely made by hand. A painting or drawing is first made of the scene. Seashells are broken into pieces and flattened and then are pasted or glued to form certain parts of the scenes, such as the birds, the fish, and the buildings. The artist then paints around the parts of the scene, usually the part of the scene that the artists desires to draw specific attention to. The whole scene is lacquered and each scene is signed by the artist. The process for each lacquerware art takes up to three months to produce.

Three photographs were submitted depicting three different scenes, birds on grass and in flight with mountains in the background, fish under sea, and a city in Vietnam with trees, a house, the sky and other landscaping. Each lacquerware art appears to contain four sections with one continuous scene. Each section appears to be about 15 × 20 inches. There is no indication that the lacquerware art articles are used as utilitarian screens or room dividers. There is no indication whether the articles contain hardware for wall hanging. The size of the articles as depicted in the photographs suggest that they are not screens or room dividers.

Issue:

The issue is whether the lacquerware art articles as described above qualify for classification as collages or similar decorative plaques, in subheading 9701.90.0000, HTSUS.

Law and Analysis:

Subheading 9701.90.0000, HTSUS, covers collages and similar decorative plaques, with a free rate of duty both at the general rate and the Column 2 rates of duties. The HTSUS does not define the term "collages".

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, states that collages and similar decorative plaques provided for under subheading 9701.90.0000, HTSUS, consist of:

> [B]its and pieces of various animal, vegetable or other materials, assembled so as to form a picture or decorative design or motif and glued or otherwise mounted on a backing, e.g., of wood, paper or textile material. The backing may be plain or it may be hand-painted or imprinted with decorative or pictorial elements which form part of the overall design. Collages range in quality from articles cheaply produced in quantity for sale as souvenirs up to products which require a high degree of craftsmanship and which may be genuine works of art.
>
> For purposes of this group, the term "similar decorative plaques" does not include articles consisting of a single piece of material, even if mounted or glued on a backing, which are more specifically covered by other headings of the Nomenclature such as "ornaments" of plastics, of wood, of base metal, etc. Such articles are classified in their appropriate Headings (headings 44.20, 83.06, etc.). (Emphasis in original.)

Webster's New World Dictionary of American English (Third College Edition) 1988, at page 273, defines the term "collage" as an "art form in which bits of objects such as newspaper, cloth, pressed flowers, etc., are pasted together on a surface in incongruous relationship for their symbolic or suggestive effect."

The above sections of the EN and similar definitions for the term "collages" were cited in Customs Headquarters Ruling Letters (HRL) 952578, dated April 8, 1994, 957621, dated July 12, 1995, and 958360, dated October 13, 1995, and are useful guidelines for determining classification in subheading 9701.90.00, HTSUS.

In HRL 952578, it was determined that the articles did not consist of bits and pieces of various animal, vegetable or other materials, glued or otherwise mounted on a backing as

stated by EN but rather consisted of either individual framed photographs (which may have been partially hand-painted) or a collection of individual framed photographs hanging by strings to a wall or ceiling or to a piece of wearing material and were not collages.

In HRL 957621, knotted nautical knots made of nylon on display on a mounted backing for wall hanging were neither collages or similar decorative plaques because the articles did not consist of a collection of bits of pieces put together to create a picture or decorative design or motif.

However, HRL 958360, held that a skiing Memorabilia Shadow Box designed for wall hanging and consisting of bits of pieces of various materials glued on a backing of wood and paper to form a decorative skiing design, was a decorative plaque similar to a collage and classified in subheading 9701.90.0000, HTSUS.

In the current case, seashells are broken into pieces, flattened, and glued to a wooden backing to form a design or motif of various scenes of birds, fish, and a city, with a painted background and heavily lacquered. We note that collages and plaques are designed for wall hanging. Assuming that the lacquerware art articles as described and as shown in the photographs are designed for wall hanging and not used as screens or room dividers, then they are classified as collages or similar decorative plaques.

Holding:

Lacquerware art articles as described above and as depicted in the submitted photographs, if designed for wall hanging, are classified as collages or similar decorative plaques, in subheading 9701.90.0000, HTSUS.

NYRL 812050, dated July 21, 1995, is modified in accordance with this ruling.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION/REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF BARN CLEANER REPLACEMENT CHAIN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification/revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify one ruling and revoke another relating to the tariff classification of barn cleaner replacement chain. The merchandise is a type of chain consisting of alternating links and paddles which are joined together in a hook-and-eye arrangement. Operated from a power source, this chain functions in a continuous cycle of operation to sweep animal waste from dairy barns by means of the paddles. Customs invites comments on the correctness of the proposed modification and revocation.

DATE: Comments must be received on or before March 29, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Submitted comments may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th. Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify one ruling and revoke another relating to the tariff classification of barn cleaner replacement chain. Customs invites comments on the correctness of the proposed modification/revocation.

NY 830398, dated October 19, 1988, held, among other things, that certain barn cleaner replacement chain in a hook-and-eye arrangement was classifiable as articulated link chain, in subheading 7315.12.00, Harmonized Tariff Schedule of the United States (HTSUS). This chain consists of links with one end in the shape of a J and the other end looped or closed. Iron or steel shapes called paddles, each typically measuring 2 inches × 2 inches × ¼ inch, are welded at regular intervals along the length of the chain. The classification was based on Customs belief that the chain was in fact articulated, that is, the segments were united by pins or other joints. The ruling also held that the chain was eligible for duty-free entry under heading 9817.00.60, HTSUS, a provision for parts to be used in articles provided for in headings 8432, 8433, 8434 and 8438, HTSUS. *HQ* 088358, dated March 1, 1991, modified *NY* 830398 by confirming that the chain was classifiable in subheading 7315.12.00, but stating the chain was excluded from heading 9817.00.50, HTSUS, as machinery, equipment and implements to be used for agricultural or horticultural purposes, because a Chapter 98 legal note excluded articles of Chapter 73.

It is now Customs position that chain in a hook-and-eye arrangement with paddles welded at regular intervals along its length, is not articulated for tariff purposes, and that such chain is eligible for duty-free entry under heading 9817.00.50, HTSUS, if otherwise qualified, because the Chapter 98 exclusion does not apply. *NY* 830398 is set forth as "Attachment A" to this document. *HQ* 088358 is set forth as Attachment "B" to this document.

Customs intends to modify *NY* 830398 to reflect the proper classification of hook-and-eye chain with paddles as other chain, under subheading 7315.89.50, HTSUS. Customs intends to revoke *HQ* 088358 to reflect that the subject chain is eligible for duty-free entry under head-

ing 9817.00.50, if otherwise qualified. Before taking this action, we will give consideration to any written comments timely received. Proposed *HQ* 958875 modifying *NY* 830398 and revoking *HQ* 088358 is set forth as "Attachment C" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: February 8, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, October 19, 1988.

CLA–2–06:S:N:N1:106 830398
Category: Classification
Tariff No. 8403.20.0060 and 7315.12.0080

MR. JIM BARBEAU
A.N. DERINGER, INC.
P.O. Box 824
Fort Covington, NY 12937–0824

Re: The tariff classification of a Husky Snow Blower and Barn Cleaner Replacement Chain from Canada.

DEAR MR. BARBEAU:

In your letter dated May 20, 1988, on behalf of Husky Farm Equipment Ltd., you requested a tariff classification ruling.

You have enclosed descriptive literature. The Husky Snow Blower is a one unit item with an auger as part of the apparatus, The snow blower is used to remove snow from farmers' yards and is driven by a farm tractor power source. Features include a heavy duty P.T.O. with shear pin, heavy steel wear plate, roller-chain auger chain, strongly braced frame and 3-point hitch to avoid twisting, extra heavy gear box and rotating chute. The 7 foot model weighs, 850 pounds and has a fan with 3 blade channel, the 8 foot model weighs 950 pounds and has a fan with 3 blade channel, and the 9 foot model weighs 1,800 pounds and has fan with 4 blade channel.

Two different types of barn cleaner chain were submitted for classification. The first type incorporates flat links which alternate with paddles. The paddles are 2 inches × 2 inches × ¼ angle iron. The pitch is 4½ inches, and there are five parts per pitch. The second type of barn cleaner chain, "hook and eye", consists of alternating links and paddles which are linked together in a hook and eye arrangement. There is only one part per pitch.

This classification decision is under the Harmonized Tariff Schedule of the United States (HTS), effective January 1, 1989, subject to changes before the effective date.

The applicable HTS subheading for the Husky Snow Blower will be 8430.20.0060, which provides for other snow blowers. The rate of duty will be 2.5 percent *ad valorem*.

The applicable HTS subheading for the subject chains will be 7315.12.0080, which provides for other articulated link chain. The rate of duty will be 4.2 percent *ad valorem*.

Number 9817.00.60. free of duty, is the HTS provision for parts to be used in articles provided for in headings 8432, 8433, 8434 and 8436. In the alternative, upon the submission of

actual use certification, as provided in Section 10.131–10.139 of the Customs Regulations, those chains which, in their condition as imported, are cut to length for installation as components in the machines of the above headings, would be classifiable in subheading 9817.00.60.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations [19 C.F.R. 177].

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents are filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 1, 1991.
CLA–2 CO:R:C:M 088358 JMH
Category: Classification
Tariff No. 7315.12.00 and 9817.00.50

MR. JIM BARBEAU
A.N. DERINGER, INC.
P.O. Box 824
Fort Covington, NY 12937–0824

Re: Modification of New York Ruling Letter 830398, dated October 19, 1988; barn cleaner replacement chain; agricultural machinery, equipment and implements; Section XXII, Chapter 98, Subchapter XVII, U.S. Note 2(ij); Headquarters Ruling Letter 086211, dated March 24, 1990; Headquarters Ruling Letter 087076, dated June 14, 1990.

DEAR MR. BARBEAU:

This office has been asked to review the classification of certain barn cleaner replacement chains which were the subject of New York Ruling Letter 830398 ("NY 830398"), dated October 19, 1988.

Facts:

The articles in question are various types of barn cleaner replacement chains. The chains were described in NY 830398 as follows:

> The first type incorporates flat links which alternate with paddles. The paddles are 2 inches × 2 inches × ¼ angle iron. The pitch is 4½ inches, and there are five parts per pitch. The second type of barn cleaner chain, "hook and eye", consists of alternating links and paddles which are linked together in a hook and eye arrangement. There is only one part per pitch.

NY 830398 classified the barn cleaner chains in subheading 7315.12.00, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), as "Chain and parts thereof, of iron or steel * * * Articulated link chain and parts thereof * * * Other chain * * *" Additionally, NY 830398 stated that provided Customs Regulations 10.131–10.139, 19 C.F.R. 10.131–10.139 were met, the chain was eligible for classification under subheading 9817.00.50, HTSUSA. Subheading 9817.00.50 grants duty free status to certain agricultural equipment, apparatus and machinery.

Issue:

Whether the barn cleaner chain is entitled to classification under heading 9817.00.50, as agricultural machinery, equipment and implements.

Law and Analysis:

The classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation ("GRIs"). GRI 1, HTSUSA, states in part that "for legal purposes, classi-

fication shall be determined according to the terms of the headings and any relative section or chapter notes * * *." The heading in question, heading 9817.00.50, states the following:

9817.00.50 Machinery, equipment and implements to be used for agricultural or horticultural purposes * * *

Headquarters Ruling Letter 086211 ("HQ 086211"), dated March 24, 1990, and Headquarters Ruling Letter 087076 ("HQ 087076"), dated June 14, 1990, promulgated a three-part test for the determination of when an item is "machinery, equipment, and implements" under heading 9817.00.50. The three steps which must be met are:

(1) The article in question must not be excluded from the heading under section XXII, Chapter 98, Subchapter XVII, U.S. Note 2, HTSUSA.

(2) The article to be classified must be the article that performs the agricultural or horticultural pursuit in question. If the article only performs a portion of that pursuit, it is a part, not machinery, equipment or an implement within the heading.

(3) The article must have the actual use certification required under 10 C.F.R. 10.138.

The barn cleaner chains are classified within subheading 7315.12.00. Section XXII, Chapter 98, Subchapter XVII, U.S. Note 2(ij), HTSUSA, excludes articles of chapter 73 from classification within heading 9817.00.50. Subheading 7315.12.00 is within chapter 73. Therefore, the barn cleaner chains cannot be classified in heading 9817.00.50. The chains are not entitled to duty free entry. Since the barn cleaner chains fail the first part of the test, there is no need to examine the other two steps.

Holding:

This ruling affirms that the barn cleaner chains, one of the subjects of NY 830398, are classified within subheading 7315.13.00. However, NY 830398 was incorrect to classify the barn cleaner chains in heading 9817.00.50. Section XXII, Chapter 98, Subchapter XVII, U.S. Note 2(ij), HTSUSA, excludes articles of chapter 73 from classification within heading 9817.00.50. Subheading 7315.12.00 is within chapter 73, therefore, the chains are excluded from 9817.00.50. The chains are not entitled to duty free entry.

In order to insure uniformity in Customs classification of this merchandise and to eliminate uncertainty we are modifying NY 830398. This modification is effective with the date of this letter. After your review of this letter should you disagree with the decision's legal basis, you are invited to submit any arguments you might have with respect to this matter for our review. Any arguments you wish to submit should be received within 30 days of the date of this letter.

This notice should be considered a modification of NY 830398 in accordance with Customs Regulation 177.9(d)(1), 19 C.F.R. 177.9(d)(1). This decision is not to be retroactively applied to NY 830398, and therefore, this ruling will not affect past transactions for the importation of your client's merchandise entered under NY 830398. *See* Customs Regulation 177.9(d)(2), 19 C.F.R. 177.9(d)(2). Furthermore, NY 830398 will not be valid precedent for the purposes of future transactions in merchandise of this type.

We recognize that future transactions may be adversely affected by this modification since current contracts for importation arriving at United States ports subsequent to this ruling will not be classified pursuant to NY 830398. If such a situation should arise your client may, at their discretion, notify this office and apply for relief from the binding effects of this decision as may be warranted by the circumstances.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:MM 958875 JAS
Category: Classification
Tariff No. 7315.89.50 and 9817.00.50

MR. JIM BARBEAU
A.N. DERINGER, INC.
P.O. Box 824
Port Covington, KY 12937–0824

Re: *NY* 830398 Modified, *HQ* 088358 revoked; barn cleaner replacement chain; iron or steel hook-and-eye chain with welded paddles; articulated chain, other chain; Heading 9817.00.50, agricultural machinery, equipment and implements, Chapter 98, U.S. Note 2(ij).

DEAR MR. BARBEAU:

NY 830398, dated October 19, 1988, issued to you on behalf of Husky Farm Equipment, Ltd., by the Area Director of Customs, New York Seaport, held, among other things, that certain barn cleaner replacement chain in a hook-and-eye arrangement was classifiable as other articulated link chain, in subheading 7315.12.00, Harmonized Tariff Schedule of the United States (HTSUS). The ruling also held that the chain was eligible for duty-free entry under heading 9817.00.60, HTSUS, as parts to be used in articles of headings 8432, 8433, 8434 and 8436, HTSUS. Subsequently, *HQ* 088358, dated March 1, 1991, modified *NY* 830398 by holding the chain was not eligible for duty-free entry under heading 9817.00.50, HTSUS, as machinery, equipment and implements to be used for agricultural or horticultural purposes because of a Chapter 98 legal note that excluded, with certain limited exceptions, goods of Chapter 73. We have reconsidered the matter and are of the opinion that these rulings are incorrect in whole or in part and must be modified and/or revoked.

Facts:

The barn cleaner replacement chain in a hook-and-eye arrangement, the subject of *NY* 830398, is iron or steel chain with each link having a J shape at one end end the other end looped or closed. Iron or steel shapes or paddles, each typically measuring 2 inches × 2 inches × ¼ inch, are welded to this chain at regular intervals. Chain of this type is attached to an independent source of power and operates in a continuous cycle of operation, to sweep animal waste from dairy barns.

The provisions under consideration are as follows:

7315	Chain and parts thereof, of iron or steel:
	Articulated link chain and parts thereof:
7315.12.00	Other chain * * * 3.4 percent *ad valorem*
	Other chain:
7315.89	Other:
7315.89.50	Other * * * 5.3 percent *ad valorem*

Issue:

Whether hook-and-eye chain with paddles is articulated link chain for term purposes; whether this chain is eligible for duty-free entry under heading 9817.00.50.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Where not defined in a section or chapter legal note, or in the **Harmonized Commodity Description and Coding System Explanatory Notes (ENs),** term terms are construed according to their common and commercial meanings which are presumed to be the same. The term ***articulated,*** for purposes of subheading 7315.12.00, is not defined in the HTSUS or in the heading 73.15 **ENs.** In common meaning, the term relates to articles

with segments united by joints such as pins. The links of hook-and-aye chain are united by looping the J end of one link through the closed end of another link. Such chain is not articulated for tariff purposes. It is classifiable in subheading 7315.89.50, HTSUS, as other chain.

As stated in *HQ* 088358, to be eligible for duty-free entry under heading 9817.00.50, a good must not be excluded by a U.S. legal note in Chapter 98, Subchapter XVII; it must be an article that performs the agricultural or horticultural pursuit in question; and the good must have the required actual use certificate. Chapter 98, U.S. Note 2(ij), precludes articles of Chapter 73 from classification in heading 9817.00.50. However, Note 2(ij) states that articles provided for in subheadings 7315.81 through 7315.89, among other subheadings, are not subject to this exclusion.

Holding:

Under the authority of GRI 1, barn cleaner replacement chain in a hook-and-eye arrangement, with paddles, as described, is provided for in heading 7315. It is classifiable in subheading 7315.89.50, HTSUS. Articles classifiable in this provision are eligible for duty-free entry under heading 9817.00.50, HTSUS, upon compliance with applicable law and Customs Regulations.

Effect on Other Rulings:

NY 830398, dated October 19, 1988, is modified with respect to the hook-and-eye chain. *HQ* 088358, dated March 1, 1991, is revoked.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 96–31)

FORMER EMPLOYEES OF STANLEY SMITH, INC., PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 93–08–00456

[Plaintiffs' motion for judgment upon the agency record denied. Judgment entered for Defendant.]

(Decided February 6, 1996)

Law Offices of Michael P. Maxwell (Michael P. Maxwell, Edith Sanchez Shea), for Plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director; *Mary L. Smith,* Attorney, Commercial Litigation Branch, Civil Division, Dept. of Justice; Attorneys for Defendant.

OPINION

POGUE, *Judge:* Plaintiffs, former employees of Stanley Smith Security, Inc. ("Former Employees") contest the decision of the Department of Labor, Office of Trade Adjustment Assistance ("Labor"), denying Plaintiffs' petition for certification of eligibility for trade adjustment assistance benefits. Plaintiffs move for summary judgment,[1] contending that Labor's negative determination is not supported by substantial evidence, and that Labor failed to investigate the specific training and duties involved in the Former Employees' jobs. The Court holds that Labor's denial of certification is supported by substantial evidence and is in accordance with law.

FACTS

Plaintiffs are the former employees of Stanley Smith Security, Inc. working at the Trojan Nuclear Plant, Rainier, Oregon.[2] The Trojan

[1] The Court will treat Plaintiffs' motion for summary judgment as a motion for judgment upon the agency record, USCIT R. 56.1(a).

[2] Former Employees are represented by Michael J. Bender. On Aug. 3, 1994, this Court granted Mr. Bender leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a). Michael P. Maxwell was appointed to serve without fee and to appear generally on behalf of Mr. Bender, as his attorney and counselor at law.

Nuclear Plant ("Trojan") produced electricity using heat from the nuclear fission process. Portland General Electric ("PGE") was the majority owner and operator of the plant. (R. at 6.)

In developing its 1992 Integrated Resource Plan, PGE decided to phase out Trojan in 1996 rather than replace steam generators that were experiencing micro flaws in their heat transfer tubes. Then, on November 9, 1992, a leak in a steam generator tube was detected. This incident increased operating costs. (R. at 104.) The availability of better contractual terms and of surplus electricity, particularly from California and Canada, made purchased power more attractive. Consequently, on January 4, 1993 PGE decided to cease power production at the Trojan Nuclear Plant immediately rather than in 1996. (R. at 129–30.) Former employees of PGE working at Trojan and at PGE, Portland, Oregon, were certified eligible to apply for adjustment assistance in April 1993 (TA–W–28,438 and TA–W–28, 438A). (R. at 159).

On February 25, 1993, Plaintiffs filed a petition under Section 221(a) of the Trade Act of 1974, as amended, 19 U.S.C. § 2271 (1994), requesting trade adjustment assistance ("TAA"). (R. at 2–7.)

Labor commenced an investigation of Plaintiffs' eligibility for trade adjustment assistance on March 15, 1993 (TA–W–28,442).[3] The investigation revealed the following additional facts: Stanley Smith Security, Inc. ("Stanley Smith"), headquartered in San Antonio, Texas, operated at various locations in 29 states; Stanley Smith contracted with PGE to provide security at the Trojan plant; Stanley Smith's employees at the Trojan site consisted of a manager, an assistant, two clerks, and approximately 120 armed security agents; they were paid directly from Stanley Smith headquarters in San Antonio; Stanley Smith provided for their training and supervision; the workers were employed solely to provide security services and were not involved in the production of electricity. (Investigative Report, R. at 159–60.) The confidential version of the administrative record reveals that Stanley Smith provided contractual security services; that Stanley Smith did not perform earlier or later stages of processing in the production of electricity; that PGE did not have any authority regarding Stanley Smith employees; that Stanley Smith paid and maintained benefits for its employees; and that payroll transactions and personnel actions were controlled solely by Stanley Smith. (C.R. at 163–64.)

Based on the investigation, on May 10, 1993 Labor denied eligibility to apply for adjustment assistance.[4] Labor explained that service workers

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[3] The petition was considered in relation to the other petition filed by PGE workers at the Trojan Nuclear Plant, Rainier, Oregon (TA–W–28,438). (Petition Verification, R. at 149.)

[4] Section 222 of the Trade Act of 1974, 19 U. S. C. § 2272, as amended, provides:

(a) The Secretary shall certify a group of workers * * * as eligible to apply for adjustment assistance under this subpart if he determines—

(1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated,

(2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and

(3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

Continued

"may be certified only if their separation was caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related * * * by ownership, or a firm related by control." Negative Determination Regarding Eligibility To Apply For Worker Adjustment Assistance, 58 Fed. Reg. 30072 (May 25, 1993). (R. at 167–69.)

On June 1, 1993, Plaintiffs requested reconsideration of Labor's negative determination, stressing that security services at a nuclear facility are in the direct line of production of electricity, because security plans must be maintained as a condition of the license to operate and produce electricity. (R. at 174.)

Labor confirmed its initial negative determination on June 24, 1993, commenting that "[t]he worker adjustment assistance was not intended to provide TAA to workers who are in some way related to import competition but only for those workers who produce an article and are adversely affected by increased imports of like or directly competitive articles which contributed importantly to sales or production." Notice of Negative Determination Regarding Application for Reconsideration, 58 Fed. Reg. 35982 (July 2, 1993). (R. at 197–98.)

This action was initiated by a letter complaint dated August 2, 1993. The issue presented is whether Labor's negative determination is supported by substantial evidence on the administrative record, and is otherwise in accordance with law.

JURISDICTION AND STANDARD OF REVIEW

Pursuant to 19 U.S.C. § 2395 (1994)[5] and 28 U.S.C. § 1581(d)(1) (1988 & Supp. 1993),[6] the Court has exclusive jurisdiction to review Labor's final determination regarding the eligibility of workers for adjustment assistance under section 223 of the Trade Act of 1974, as amended, 19 U.S.C. § 2273 (1994).

The scope and standard of review in the present case is prescribed by 28 U.S.C. § 2640(c) (1988 & Supp. 1993) and 19 U.S.C. § 2395 (1994). Judicial review is on the administrative record and Labor's findings of fact, if supported by substantial evidence, are conclusive. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

(b) For purposes of subsection (a)(3) of this section—

(1) The term "contributed importantly" means a cause which is important but not necessarily more important than any other cause

• • • • • • •

[5] 19 U.S.C. § 2395 provides:

• • • • • • •

(b) Findings of fact by Secretary; conclusiveness; new or modified findings

The findings of fact by the Secretary of Labor or the Secretary of Commerce, as the case may be, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to such Secretary to take further evidence, and such Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) Determination; review by Supreme Court

The Court of International Trade shall have jurisdiction to affirm the action of the Secretary of Labor or the Secretary of Commerce, as the case may be, or to set such action aside, in whole or in part * * *.

[6] 28 U.S.C. § 1581(d)(1) provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act.

Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). At the same time, substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 619–20 (1966).

DISCUSSION

When investigating a petition for certification of eligibility for trade adjustment assistance, Labor must determine whether the group of workers meets the adjustment assistance eligibility requirements set forth in 19 U.S.C. § 2272.[7] In the present case, Labor determined that Plaintiffs were not eligible for trade adjustment assistance because they failed to meet the requirements of § 2272 (a)(3).

Plaintiffs challenge Labor's determination, claiming that Labor failed to investigate the specific training and duties involved in the Former Employees' job, and to determine the purpose of their work in relation to the production of electricity. (Plaintiffs' Memorandum at 6.) Indeed, Plaintiffs explain that they were integral to the production of electricity because they were "central and pivotal" to such production, and their role was essential. *(Id.* at 9.) As such, even assuming that their work cannot be characterized as *production,* they are entitled to assistance, because they were involved in the production of an article. *(Id.* at 6–7, 10–11.)

To this effect, Plaintiffs invoke the authority of *Abbot v. Donovan,* 6 CIT 92 (1983). In *Abbot,* Labor, while certifying the workers employed in two departments, had excluded other workers who provided ancillary and support services to the certified departments. The court observed that the adjustment assistance provisions of the Trade Act of 1974 are silent regarding coverage for service workers, and similarly silent is the legislative history. Hence, "the court must accord substantial deference to the interpretation of the statute by the agency." *Id.* at 100. The court noted that Labor's interpretation of the Trade Act was oriented toward certifying service workers only when there was an important causal nexus between increased imports and the layoff of service workers. "That nexus is deemed to exist if a substantial amount of the service workers' activity was directly related to the production of the import-impacted article. For five years, the Department of Labor has implemented its interpretation of the statute by requiring that at least 25% of

[7] *See supra,* note 4. The Trade Act of 1974 was intended "to foster the economic growth of and full employment in the United States and to strengthen economic relations between the United States and foreign countries through open and nondiscriminatory world trade," 19 U.S.C. § 2102(1), as well as "to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firm[s], workers, and communities to adjust to changes in international trade flows," 19 U.S.C. § 2102(4). Recognizing that increased imports could burden some domestic industries, Congress provided adjustment assistance for workers, firms, and communities injured by import competition. In fact, a group of workers can qualify for benefits including compensation, employment services, training, job search and relocation allowances, 19 U.S.C. § 2291–98, if the Secretary of Labor determines that the requirements for granting the benefits, enumerated under § 2272, are met.

The purpose of the TAA program is to offset the negative effects on the work force whose jobs the company has eliminated. Congress intended to "encourage workers who are unemployed because of import competition to learn the new skills necessary to find productive employment in a changing American economy." S. Rep. No. 71, 100th Cong., 1st Sess. 11 (1987).

the service workers' activity be expended in service to the subdivision which produces the import-impacted article." *Id.* at 101.[8]

The present case is distinguishable from *Abbot.* Labor did not have to investigate the existence of the *important causal nexus* between increased imports and the Plaintiffs' layoffs; nor did Labor have to report on the percentage of service workers in relation to the production workers. Such investigation occurs only when the petitioning workers are *employed by a firm that produced, directly or through an appropriate subdivision, the import-impacted article.*[9] Here, the firm that produced the import-impacted article is PGE. Even though assigned to PGE's Trojan plant, Plaintiffs were employees of Stanley Smith and not of PGE.[10] Once Labor concluded that Plaintiffs' employer was not the firm that produced the import-impacted article (PGE), it could also conclude that the Former Employees were not eligible for assistance.[11]

It is true that, in order to maintain its license, the nuclear plant was required to keep a security system composed of officers specifically trained to perform tasks and duties in accordance with the "physical security plan."[12] It is also true that, in compliance with the federal regulations, some PGE employees supervised the security system implemented at Trojan, i.e., they supervised Stanley Smith's employees.[13] Finally, it may be equally true that the reduction of security officers matches the percentage reduction of PGE employees, and thus the net impact is virtually the same. (Letter from PGE, R. at 177.) However, there was no relationship between PGE and Stanley Smith other than a contractual one.[14] The confidential record reports that PGE did not have any power to hire and fire them, nor any control other than supervision on their training. (C.R. at 163–64.) It is Stanley Smith that supervises, hires and fires its employees as conditions seem fit, and Stanley

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[8] The court remanded the case, because Labor had determined that the cost of services was significantly less than 25% of the cost of the work directed to production, neglecting, however, to include these data in the administrative record.

[9] 29 CFR § 90 (1995) covers "certification of eligibility to apply for worker adjustment assistance." 29 CFR § 90.2, which contains the "definitions," provides:

> • • • • • • • •
>
> *Appropriate subdivision* means an establishment in a multi-establishment firm which produces the domestic articles in question or a distinct part or section of an establishment (whether or not the firm has more than one establishment) where the articles are produced. The term *appropriate subdivision* includes auxiliary facilities operated in conjunction with (whether or not physically separate from) production facilities
>
> • • • • • • • •
>
> Firm includes an individual proprietorship, partnership, joint venture, association, corporation (including a development corporation), business trust, cooperative, trustee in bankruptcy, and receiver under decree of any court. A firm, together with any predecessor or successor-in-interest, or together with any affiliated firm controlled or substantially beneficially owned by substantially the same persons, may be considered a single firm.

[10] Plaintiffs have not presented allegations that Stanley Smith Security, Inc. is affiliated, controlled or owned by PGE, nor does the record reveal that PGE is or acts as Stanley Smith's *alter ego. See* 29 CFR § 90.2.

[11] *See Woodrum v. Donovan,* 5 CIT 191 (1983), *aff'd,* 2 Fed. Cir. (T) 82 (1984), where former employees of an automobile dealership challenged the denial of assistance contending that they were part of the production process for new automobiles because their labor was essential to the final delivery of the automobiles to the general public. The court observed that "[o]n occasion, the Secretary has certified service workers, but only where he has determined that they were integrated into the production of articles adversely affected by increased imports. The predicate for the determination is a finding that the petitioning workers were employed by a 'firm' which produced, or had an $appropriate subdivision' which produced, the import-impacted article." *Id.* at 199.

[12] 10 CFR 50.34(c) (1995); 10 CFR Ch. 1, App. B (1995).

[13] In the case of contract personnel, the regulations prescribe that the qualifications of each individual must be documented and attested by a licensee's security supervisor. 10 CFR Ch. 1, App. B, II.C.

[14] Plaintiffs recognize that their relationship with PGE and Trojan is a contractual one.

Smith is not owned or under the control of any of its other customers.[15] Consequently, there is substantial evidence in the record in support of Labor's determination. This Court does not analyze the relationship of the Former Employees' activity to the production of electricity, and whether they were service workers entitled to certification, because Plaintiffs were not employed by the firm that produced the import-impacted article, PGE.

Plaintiffs' allegations and defenses do not impinge on Labor's determination. Even though the nature and extent of the investigation must be adequate to obtain the necessary information upon which to make a determination and meet a threshold requirement of reasonable inquiry, Labor's actions here were within the scope of its discretion. *Woodrum v. Donovan,* 4 CIT 46, 51 (1982), *aff'd,* 2 Fed. Cir. (T) 82 (1984); *Former Employees of Hewlett-Packard Co. v. United States,* 17 CIT 980, 984 (1993).

CONCLUSION

After considering the papers submitted herein, relevant case law as well as the administrative record, the Court holds that Labor's determination is supported by substantial evidence contained in the record, and is in accordance with the trade adjustment assistance provisions of the Trade Act of 1974.

Accordingly, Plaintiffs' motion for judgment upon the administrative record is denied, Labor's negative determination is affirmed, and this action is dismissed.

(Slip Op. 96–32)

UNITED STATES SHOE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–11–00668

[Interest on HMT payments challenged pursuant to 28 U.S.C. § 1581(i) may be awarded pursuant to 28 U.S.C. § 2411.]

(Dated February 7, 1996)

Seigel, Mandell & Davidson, P.C. (Brian S. Goldstein, Paul A. Horowitz and *Laurence M. Friedman)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, *Jeanne E. Davidson,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Elizabeth Newsom), Richard McManus,* Office of the Chief Counsel, United States Customs Service, of counsel, for defendant.

Baker & McKenzie (William D. Outman, II and *Kevin M. O'Brien)* for Brown-Forman Corporation, Fisher Controls, International Co., Hewlett-Packard Corporation, Interna-

[15] *See* the CFR definitions of *appropriate subdivision* and of *firm.* 29 CFR § 90.2.

tional Business Machines Corporation, Minnesota Mining & Manufacturing Corporation and Seagate Technology Corporation, *amici curiae.*

Barnes, Richardson & Colburn (James S. O'Kelly, Robert E. Burke, Matthew T. McGrath, Lawrence M. Friedman, Christopher E. Pey and *Cindy H. Chan)* for Firmenich, Inc., Amoco Chemical Company and Polaroid Corporation, *amici curiae.*

Coudert Brothers (Steven H. Becker, Charles H. Critchlow and *Claire R. Kelly)* for Texaco Refining and Marketing, Inc., American Natural Soda Ash Corp., United Export Corp., ABRO Industries, GSI Exim America, Inc., Vitol S.A., Inc., M-C International D/B/A McLane Group International L.P., Bridgestone/Firestone Inc., Dorland Management, Inc., FAI Trading Co., Star Enterprises, Inc., Vista Chemical Co., Champion International Corp., Champion Export Corp. and ISP Technologies, Inc., *amici curiae.*

Crowell & Moring (Barry E. Cohen) for E.I. du Pont de Nemours & Co., *amicus curiae.*

Dorsey & Whitney P.L.L.P. (John B. Rehm and *Munford Page Hall, II)* for New Holland North America, Inc., *amicus curiae.*

Grunfeld, Desiderio, Lebowitz & Silverman, L.L.P. (Steven P. Florsheim and *Erik D. Smithweiss)* for Boise Cascade Corporation, Etonic Inc., Germain-Webber Lumber Co., Inc., International Veneer Co., Mondial International Corp. and The Heil Co., *amici curiae.*

LeBoeuf, Lamb, Greene & Macrae, L.L.P. (Melvin S. Schwechter, John C. Cleary and *Wendy L. Klunk)* for Aluminum Company of America, Alcoa International, S.A., Alcoa Inter-America, Inc., Alcoa Memory Products, Inc., H-C Industries, Inc. and The Stolle Corporation, *amici curiae.*

Irving A. Mandel, Thomas J. Kovarcik, Steven R. Sosnov and *Jeffrey H. Pfeffer,* of counsel, for Allied Textiles Sales Company, Sheftel International Inc., Fab-Tech Inc., Sirex, Ltd., Debois Textiles, Inc., Capital Textiles, Inc., M. Kopepel Company, Dumont Export Corporation, United Overseas Corporation, Regent Corporation and Muran Universal, Inc., *amici curiae.*

McKenna & Cuneo (Peter Buck Feller, Joseph F. Dennin, Michael K. Tomenga, Lawrence J. Bogard and *Brian O'Shea)* for Swisher International, Inc., *amicus curiae.*

Neville, Peterson & Williams (John M. Peterson, George W. Thompson and *James A. Marino)* for Aris-Isotoner, Inc., Berwick Industries, Inc., Chevron Chemical Company, Inc., Chevron Chemical International Sales, Inc., Chevron International Oil Company, Chevron Overseas Petroleum, Inc., Chevron U.S.A., Inc., Fieldston Clothes, Inc., General Glass International Corporation, Microsoft Corporation, The Pillsbury Company, Rhone-Poulenc, Inc., Uniroyal Chemical Company, Inc., Xerox Corporation, Xerox Corporation, Americas Operations Division, Xerox Corporation, Southern California Manufacturing Operations Division and Xerox International Partners, *amici curiae.*

Rode & Qualey, Patrick D. Gill and *John S. Rode,* of counsel, for General Chemical Corporation, Sumitomo Corporation of America, Newell International, Siemens Energy & Automation, Inc., Siemens Power Corp., Siemens Medical Systems, Inc., Siemens Transportation Systems, Inc., Siemens Solar Industries and Unisys Corporation, *amici curiae.*

MEMORANDUM OPINION

RESTANI, *Judge:* The judgment in this action awarded plaintiff $8,281.87, "together with interest and costs as provided by law." *U.S. Shoe Corp. v. United States,* Slip Op. 95–197 (Dec. 4, 1995); *see also U.S. Shoe Corp. v. United States,* 907 F. Supp. 408 (Ct. Int'l Trade 1995). It has come to the court's attention that "interest" is not a matter without controversy and it cannot be resolved as a simple clerical matter. Since the briefing of this issue, however, notice of appeal has been filed and the court lacks jurisdiction to alter the judgment.

Because the issue has been fully briefed under the captioned case by the attorneys involved in the numerous cases stayed hereunder, because the issue is relevant to the lifting of stays as to such cases, and for administrative convenience, the court will address this matter under this caption. At the outset, the court notes that in the absence of express

congressional consent, the United States is immune from an interest award. *Library of Congress v. Shaw,* 478 U.S. 310, 314 (1986). Interest is, however, available to claimants when Congress permits such interest to be awarded by statute. *Id.* at 316.

Plaintiff and *amici* contend that interest on plaintiff's payments of the Harbor Maintenance Tax ("HMT") is expressly provided for by 28 U.S.C. § 2411 (1988). That statute provides, in relevant part:

> In any judgment of any court rendered (whether against the United States, * * *) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under [26 U.S.C. § 6621] upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, * * *.

The Supreme Court has recognized that section 2411 constitutes an express waiver of sovereign immunity with respect to interest and expressly authorizes prejudgment and postjudgment interest payable by the United States in tax-refund cases. *Shaw,* 478 U.S. at 318 n.6. Furthermore, section 2411 applies when taxes are improperly and illegally collected. *Sterns v. Clauson,* 122 F. Supp. 795, 797 (D. Me. 1954).

This court has held that the HMT on exports constitutes a tax prohibited by the Export Clause of the Constitution. *U.S. Shoe Corp.,* 907 F. Supp. at 418. The HMT is a tax provided for by the Internal Revenue Code. *See* 26 U.S.C. §§ 4461–62 (1994).

Congress, however, has expressly provided in the Water Resources Development Act of 1986, 26 U.S.C. §§ 4461–62, that the HMT is to be treated as a customs duty for the purposes of administration and enforcement as well as jurisdiction. *See id.* § 4462(f)(1)–(2). Additionally, section 4462(f)(3), Title 26, United States Code, provides, in relevant part, that "[t]he tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the *administration and enforcement of internal revenue taxes.*" *Id.* § 4462(f)(3) (emphasis added).

The court finds, however, that any monetary relief granted by the court would not constitute either "administration" or "enforcement" of the HMT as envisioned by 26 U.S.C. § 4462(f)(3). That section is limited to matters of routine administration and enforcement by an agency. The legislative history of the HMT statute explains that the underlying purpose of both section 4462(f)(1) and (3) was to confirm which agency was to have responsibility for collecting and processing HMT payments. *See* S. Rep. No. 228, 99th Cong., 1st Sess. 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714–15 (stating Customs' strong presence at ports of entry and experience at appraising imported merchandise made it appropriate for Customs, rather than Internal Revenue Service to collect, administer, and enforce HMT). The court also notes that while Con-

gress expressly sought to preclude application of the administrative provisions of the Internal Revenue Code in the collection and processing of the HMT, section 2411 is within Title 28 of the United States Code, which governs the judiciary and judicial procedure, rather than an administrative provision within Title 26 (the Internal Revenue Code).

Furthermore, a money judgment for customs duties protested by ordinary administrative and judicial procedures would include interest calculated in a manner similar to that provided for in 28 U.S.C. § 2411. *See* 19 U.S.C. § 1520(d) (1988); 19 U.S.C. § 1505(c) (1994); 28 U.S.C. § 2644 (1988). Defendant correctly maintains that these statutory provisions, however, do not apply to payments of the HMT where no decision by Customs has been made or no liquidation has occurred. Defendant further maintains that as section 2411 requires the Commissioner of Internal Revenue to take an active role in tendering and setting the date of payment, Congress could not have intended section 2411 to apply to payments of the HMT. The court notes that the issue of *how* payments of any type are to be made is one of administration. Under the statutory scheme, Customs, not the Commissioner, is required to collect payments of the HMT. The court finds that requiring the Commissioner, rather than Customs, to tender and set the date of payment under a strict literal reading of section 2411 or obviating the requirement of interest because Customs administers the statute but did not provide a decision or liquidation, would be illogical and contrary to legislative intent. *See Witco Chem. Corp. v. United States,* 742 F.2d 615, 619 (Fed. Cir. 1984) ("[A]n absurd construction of a statutory provision should be avoided."); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 n.9 (1983) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

Reading the applicable statutes *in pari materia* and finding defendant's interpretation of 28 U.S.C. § 2411 and 26 U.S.C. § 4462 as read together unreasonable, the court must construe the statutes, keeping in mind that "[a]ll statutes must be construed in light of their purpose." *Wassenaar v. Office of Personnel Mgmt.,* 21 F.3d 1090, 1096 (Fed. Cir. 1994) (quoting *Best Power Technology Sales Corp. v. Austin,* 984 F.2d 1172, 1175 (Fed. Cir. 1993)); *see also Marlowe v. Bottarelli,* 938 F.2d 807, 813 (1991) (stating rule that "whenever possible courts construe statutes and regulations *in pari materia*"). The court finds that in actions brought pursuant to 28 U.S.C. § 1581(i) (1988 & Supp. V 1993), Congress intended to provide interest on payments of the HMT for exports pursuant to section 2411, but that related administrative actions would be performed by Customs.

(Slip Op. 96–33)

INNER SECRETS/SECRETLY YOURS, INC., PLAINTIFF *v.* UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Court No. 95–01–00044

Plaintiff applies pursuant to Rule 68(a) of this Court and the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and (b) (1988 & Supp. V 1993) (the "EAJA") for reimbursement of attorney's fees and other expenses incurred in contesting the classification by the United States Customs Service of plaintiff's merchandise.

Held: Defendants succeeded in showing that they were clearly reasonable in asserting their position, including their position at the agency level, in view of the law and the facts. As defendants' position was substantially justified, the Court denies plaintiff's request for reimbursement of attorney's fees and costs.

[Plaintiff's application for attorney's fees and expenses denied.]

(Dated February 7, 1996)

Ross & Hardies (Steven P. Kersner) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Barbara Silver Williams);* of counsel: *Karen P. Binder,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for defendants.

OPINION

TSOUCALAS, *Judge:* Pursuant to Rule 68(a) of this Court, plaintiff has filed for reimbursement of attorney's fees and other expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (1988 & Supp. V 1993).

BACKGROUND

Plaintiff made various entries of women's flannel boxer shorts imported from Hong Kong. The specific facts surrounding these importations are presumed known and will be addressed here only saliently.

In July 1994, plaintiff made two importations, classifying the subject merchandise under 6108.21.00, Harmonized Tariff Schedule of the United States ("HTSUS"), visa quota category 352, as women's knitted cotton briefs and panties at 8.1% *ad valorem.*[1] Believing plaintiff's merchandise to be outerwear, the United States Customs Service ("Customs") detained the merchandise. On August 2, 1994, Customs conditionally released plaintiff's merchandise pending evaluation by a National Import Specialist ("NIS"). Subsequently, NIS concurred with Customs that the subject boxers were classifiable as outerwear shorts under 6204.62.4055, HTSUS, and required a quota category 348 visa. On September 9, 1994, Customs issued redelivery notices with respect to these entries. Subsequent importations in September 1994 resulted in Customs' demand for redelivery or outright rejection.

Responding to plaintiff's request for an internal advice request to resolve this situation, Customs issued Headquarters Ruling Letter ("HRL") 957068 on October 11, 1994. HRL 957068 noted that another ruling, HRL 087940, set forth seven criteria for distinguishing men's

[1] At trial, plaintiff sought classification under 6208.91.3010, HTSUS.

boxer shorts from non-underwear garments. Satisfying more than one of the listed criteria rendered the article in question presumptively outerwear. A third HRL, HRL 951754, had improperly utilized the criteria set forth in HRL 087940 to determine the classification of women's flannel boxer-style shorts. Nevertheless, Customs applied the seven criteria to plaintiff's merchandise because plaintiff claimed that it had relied on the criteria in entering its merchandise. Adversely to plaintiff, Customs found that plaintiff's merchandise met two of the criteria, *i.e.*, the garments had a single leg opening greater than the relaxed waist and lacked a fly, and were presumptively outerwear shorts. Customs then evaluated the subject boxers anew based on basic tenets of classification, tariff terms, judicial precedent, marketing and advertising information, etc. confirming its classification under 6204.62.4055, HTSUS, textile category 348 visa, dutiable at 17.7% *ad valorem*.

Believing Customs' classification erroneous, plaintiff sought a preliminary injunction from this Court. The Court responded with dismissal for lack of jurisdiction as plaintiff had failed to exhaust administrative remedies. *Inner Secrets/Secretly Yours, Inc. v. United States*, 18 CIT ____, 869 F. Supp. 959 (1994). Plaintiff then filed protests challenging Customs' actions regarding the entries at issue in this case. *Defendants' Opposition to Plaintiff's Motion for Reimbursement of Attorney's Fees and Costs ("Defendants' Brief")* at 4. Customs denied its protests and plaintiff countered by applying for injunctive relief once again. The Court denied plaintiff's request for a preliminary injunction for failure to satisfy the requisite criteria. However, the Court scheduled an expedited trial. *Inner Secrets/Secretly Yours, Inc. v. United States*, 19 CIT ____, ____, 876 F. Supp. 283, 288 (1995).

A trial *de novo* was held in this case on March 1, 1995. Judgment was rendered in favor of plaintiff, the Court ruling that plaintiff had prevailed in overcoming the presumption of correctness which attaches to classifications by Customs and that plaintiff's merchandise at issue is entitled to enter the United States under subheading 6208.91.3010 of the HTSUS, visa quota category 352. *Inner Secrets/Secretly Yours, Inc. v. United States*, 19 CIT ____, ____, 885 F. Supp. 248, 257 (1995). The Government chose not to appeal and the Court's judgment became final.

As the prevailing party, plaintiff now seeks recovery under the EAJA of attorney's fees and expenses incurred in contesting Customs' classification of plaintiff's merchandise. On September 27, 1995, the Court heard oral argument on plaintiff's application.

DISCUSSION

Plaintiff alleges that, as a result of the Government's unreasonable actions, it incurred significant legal fees and expenses, was required to pay storage costs in the amount of $2,467.65, and lost $25,455 in profits because it had to reduce its selling price on 8,485 dozen boxers by $3.00 per dozen. *Memorandum of Law in Support of Plaintiff's Motion for Attorney's Fees and Costs* at 5, 12–13. In total, plaintiff seeks recovery of fees and expenses incurred from November 1994 through April 1995 in

the amount of $90,342.54. The sole question before the Court is whether plaintiff is entitled to reimbursement of attorney's fees and expenses on the basis that the Government's position in this action was not "substantially justified" under the facts of this case and the law.

The Government insists that plaintiff is not eligible for such fees as, at all times, its position was substantially justified and well supported during litigation and trial of this action. *Defendants' Brief* at 6–15. In addition, the Government submits that the attorney's fees and costs sought by plaintiff are not factually or legally supported.[2] *Id.* at 15. Specifically, the Government contends that plaintiff seeks an award for certain fees and expenses which do not qualify for reimbursement and that plaintiff's itemization of certain fees and expenses is insufficient and inaccurate. The Government also claims that plaintiff improperly seeks fees in excess of statutory limitations. *Id.* at 16–27. According to the Government, the "public fisc should not bear these 'silk pajama' expenses when 'boxer shorts' rates are plainly adequate." *Id.* at 22 n.20.

The Court now turns to resolution of the question at bar. Obviously, Rule 68(a) of the Court rules provides that the "Court may award attorney's fees and expenses where authorized by law." In addition, awards of attorney's fees and expenses are governed by the EAJA, 28 U.S.C. § 2412 which states in relevant part:

> (a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the *prevailing* party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action * * *.
>
> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States * * *.
>
> * * * * * * *
>
> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, *unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.*

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[2] Title 28, United States Code, Section 2412(d)(1)(C)(2)(A) indicates that fees and other expenses include the reasonable expenses of:

> expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)

(Emphasis added.) "[A] statute authorizing the recovery of attorneys' fees and expenses from an agency of the United States constitutes a waiver of sovereign immunity, and must be strictly construed." *United States v. Modes, Inc.*, 18 CIT ____, ____, Slip Op. 94–39 at 4 (Mar. 4, 1994).

In this matter, the "government bears the burden of establishing that its position was substantially justified or that special circumstances should preclude an award under the EAJA." *Traveler Trading Co. v. United States*, 13 CIT 380, 381, 713 F. Supp. 409, 411 (1989). *See also Covington v. Department of Health & Human Services*, 818 F.2d 838, 839 (Fed. Cir. 1987). If the Government is unable to carry its burden, the court must award the requested fees and expenses. *Traveler*, 13 CIT at 381, 713 F. Supp. at 411. *See also Brewer v. American Battle Monuments Comm'n*, 814 F.2d 1564, 1569 (Fed. Cir. 1987).

The Court then must determine whether defendant has met its statutory burden. The Supreme Court of the United States has found that the phrase "substantial justification" means:

> "justified in substance or in the main"—that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue.

Pierce v. Underwood, 487 U.S. 552, 565 (1988). *See also Urbano v. United States*, 15 CIT 639, 641, 779 F. Supp. 1398, 1401 (1991), *aff'd*, 985 F.2d 585 (1992). Thus, the Government is required to show that it "was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts. The Government must show that it has not 'persisted in pressing a tenuous factual or legal position, albeit one not wholly without foundation.'" *Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (quoting *Gava v. United States*, 699 F.2d 1367, 1375 (Fed. Cir. 1983) (Baldwin, J., dissenting)). *See also Brewer*, 814 F.2d at 1569.

Substantial Justification:

An examination of the merits of this case satisfies the Court that the Government's position, although ultimately unsuccessful, was substantially justified at all levels and was grounded in law and fact.

Preliminarily, the Court notes with respect to Customs' conduct at the administrative level that it found "no merit" to plaintiff's allegations under its first cause of action in the underlying case that (1) Customs improperly modified prior rulings by either ignoring the seven criteria in question, or by adding the new criterion of "a functional fly" and, that (2) in assigning a HTSUS classification *after* releasing plaintiff's merchandise as entered, Customs improperly modified prior treatment of substantially identical transactions without affording prior notice in violation of the Customs Modernization Act, as amended, 19 U.S.C. § 1625(c)(1) and (2) (Supp. V 1993). *Inner Secrets*, 19 CIT at ____, 885 F. Supp. at 256–57. The Court also implicitly found that the release of plaintiff's July 1994 shipments was not conclusive and Customs could

request redelivery up until liquidation was final. *Id.* at ____, 885 F. Supp. at 256–57.

Furthermore, Customs' classification determination and its position in that regard, although contrary to the Court's ultimate finding, was not without basis. First, concurring with Customs' initial cursory determination that the subject boxers were outerwear, NIS, upon official examination, determined that the subject boxers were outerwear. Answer to Complaint ¶ 13. Second, the Court heard evidence at trial relating to, *inter alia,* the Government's basis for steadfastly contending that the garments at issue lacked a fly. Specifically, Professor Hartley, "an expert in garment product development, marketing and merchandising," opined that the subject boxers lacked a fly. *Inner Secrets,* 19 CIT at ____, 885 F. Supp. at 254. Further, the Court deemed Professor Hartley's testimony credible as to usage. *Id.* at ____, 885 F. Supp. at 256.

In addition, the HRL 087940 criteria, as noted at trial, created only a rebuttable presumption that the subject merchandise was not underwear. *Id.* at ____, 885 F. Supp. at 251. HRL 957068, in fact, clearly stated, "This presumption is rebuttable, however, and the above criteria will be evaluated in conjunction with advertising and marketing information." *Affidavit of Jack Thekkekara,* Exhibit F at 4. In addition, HRL 957068, with particularity, noted the sources which Customs had alternatively consulted in classifying plaintiff's merchandise under subheading 6204.62.4055, HTSUS, *e.g.,* tariff terms, basic tenets of classification, judicial precedent, marketing and advertising information, information on fashion trends, etc. *Id.* at 5–15. *See also Inner Secrets,* 19 CIT at ____, 885 F. Supp. at 251. Therefore, from the Government's point of view, the basis existed for finding that the subject boxers were outerwear shorts. Further, the Government proffered documentary evidence at trial to corroborate its position. Although the Court found that support ineffectual,[3] the evidence did lend credence to the Government with respect to its persistence in this matter.

Thus, the Government possessed extensive support which it deemed reliable and authoritative for classifying plaintiff's merchandise and for adhering to that classification determination throughout the administrative and trial levels of this case. In fact, while the Court found plaintiff's position more convincing, nothing in *Inner Secrets,* 19 CIT at ____, 885 F. Supp. at 248, suggested that the Government presented "no plausible defense, explanation, or substantiation for its action." *Consolidated Int'l Automotive, Inc. v. United States,* 16 CIT 692, 696, 797 F. Supp. 1007, 1011 (1992). Plaintiff's disagreement with the Government's position does not render the contrary position baseless. The court has recognized that reasonable minds could differ. *See United Engineering & Forging v. United States,* 15 CIT 561, 567, 779 F. Supp. 1375, 1381 (1991); *Timken Co. v. United States,* 10 CIT 86, 98, 630 F. Supp. 1327, 1338 (1986).

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[3] *See Inner Secrets,* 19 CIT at ___, 885 F. Supp. at 255–56.

The Court also points out that 28 U.S.C. § 2412(b) applies to a *prevailing* party. Plaintiff requests reimbursement for attorney's services related to a civil action entitled *Inner Secrets/Secretly Yours, Inc. v. United States,* Court No. 94–10–00596 in which plaintiff prematurely applied for a preliminary injunction and the Court dismissed for lack of jurisdiction. *See Inner Secrets,* 18 CIT at ____, 869 F. Supp. at 959. Plaintiff was not a prevailing party in that action. Further, the court has denied an award under the EAJA where an action was brought before a court not having jurisdiction. With regard to that applicant's claimed fees and expenses incurred in defending against the defendant's motion to dismiss for lack of jurisdiction, the court stated:

> The EAJA requires that an action be brought before a court having jurisdiction * * *. The Court never had jurisdiction over the ten entries. Since a court may not rule on matters over which it has no jurisdiction, the Court also excludes from the applicant's award any fees and expenses related to its defense against defendant's motion to dismiss.

Traveler, 13 CIT at 385, 713 F. Supp. at 414. Therefore, plaintiff is ineligible for recovery of fees and expenses with regard to this action. Plaintiff also requests reimbursement for services related to *Inner Secrets/Secretly Yours, Inc. v. United States,* Court No. 95–01–00044, where judicial precedent and the facts of the case at hand clearly demonstrated that injunctive relief was inappropriate. *See Inner Secrets,* 19 CIT at ____, 876 F. Supp. at 283. Plaintiff was not a prevailing party in this action in which its tactics incurred unnecessary expenses for both parties. The Court in its discretion denies recovery for fees and costs related to plaintiff's second motion for a preliminary injunction.[4] Furthermore, the Traveler case demonstrates that an EAJA award is limited to the fees and expenses incurred in the civil action or the adversary adjudication at the administrative level. *Traveler* stated:

> [T]he applicant's claim for fees and expenses is limited to those incurred in the civil action, which commenced with the preparation and filing of a summons and complaint with the clerk of court. Moreover, fees and expenses incurred by the applicant at the administrative level are not recoverable even though the resulting work product was used in any aspect of the civil action. The applicant's obligation on these fees and expenses would exist even if the civil action had not commenced.

Id. at 385, 713 F. Supp. at 414. Therefore, plaintiff's fees and costs related to its protest of Customs' classification are not recoverable. Furthermore, plaintiff did not establish that its claimed storage expenses and losses arising from the sale of its merchandise are recompensable under the EAJA. These items are not similar to any of the allowable fees and expenses set forth in 28 U.S.C. § 2412(d).

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[4] Title 28, United States Code, Section 2412(d)(1)(C) provides that the "court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy."

In addition, plaintiff failed to "itemize fees and expenses with sufficient specificity to allow the court to determine what work is being claimed." *Traveler,* 13 CIT at 386, 713 F. Supp. at 415. Plaintiff's application is replete with expenditures relating to, *inter alia,* intellectual property rights, other visa categories, the North American Free Trade Agreement, rules of origin, and other expenses not tied specifically to this case. It is not clear to the Court whether these amounts are being claimed and, if so, whether they relate to the case at hand. In this regard, this case resembles the situation in *Nakamura v. Heinrich,* 17 CIT 119, 120 (1993), where the court disallowed plaintiff's insufficient itemization because plaintiff had not adequately distinguished between time expended on compensable and non-compensable claims. Therefore, even if plaintiff was entitled to recovery of attorney's fees and expenses, it failed to sufficiently document and itemize its claimed expenditures.

Finally, the legitimacy of the Government's interest in this case is undeniable. It is clear that the Government's conduct proceeded in the vein of legitimate enforcement of the Customs laws. In *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States,* 837 F.2d 465 (Fed. Cir.), *cert. denied,* 488 U.S. 819 (1988), the appellate court noted that:

> [T]he EAJA was not intended to be an automatic fee-shifting device in cases where the petitioner prevails * * *. [S]ubstantial justification is to be decided case-by-case on the basis of the record. *Gavette,* 808 F.2d at 1467. The mere fact that the United States lost the case does not show that its position in defending the case was not substantially justified. *Broad Ave. Laundry & Tailoring v. United States,* 693 F.2d 1387, 1391 (Fed. Cir. 1982). The decision on an award of attorney fees is a judgment independent of the result on the merits, and is reached by examination of the government's position and conduct through the EAJA "prism," *see Federal Election Comm'n v. Rose,* 806 F.2d 1081, 1090 (D.C. Cir. 1986), not by redundantly applying whatever substantive rules governed the underlying case.

Thus, because the Government has presented an acceptable basis both in law and fact for its posture, both at the administrative level and during the underlying litigation, plaintiff is not entitled to an award of fees and expenses under the EAJA. Inasmuch as plaintiff has failed to establish that it is entitled to recovery of attorney's fees and expenses under the statute, its application is denied.

CONCLUSION

In this case involving a classification question and merchandise which have not previously been judicially reviewed, it is clear that the Government's position was substantially justified. Therefore, an award of attorney's fees and expenses would be improper under the EAJA. As the Court has found the Government's arguments persuasive under the circumstances of this case, plaintiff's application for attorney's fees and expenses is DENIED.

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/2 1/30/96 Tsoucalas, J.	Amity Leather Products Co.	95–08–01122	4202.22.15 20.0%	4202.32.10 12.1 cents per kg. plus 4.6%	Agreed statement of facts	Chicago "Macro Bag Women on the Move (PU)"
C96/3 2/5/96 Carman, J.	Willis Import, Inc.	93–06–00315	7013.39.50 15%	7013.39.10 12.5%	Agreed statement of facts	Newark Tempered glassware
C96/4 2/6/96 Aquilino, J.	Genie Bottles, Inc.	94–08–00446	7013.39.50	A7013.99.30 9% or 0%	Agreed statement of facts	Tampa Perfume bottles
C96/5 2/9/96 Tsoucalas, J.	Vista International Packaging, Inc.	93–04–00213, 93–04–00241, 93–04–00242	3917.10.10 6.6%	4823.90.85 5.3%	Vista International Packaging Co. *v.* United States, Slip Op. 95–110, (June 14, 1995) 890 F.Supp. 1095	Chicago Fibrous casings
C96/6 2/9/96 Tsoucalas, J.	Vista International Packaging, Inc.	93–05–00270, 93–05–00271	3917.10.10 6.6%	4823.90.85 5.3%	Vista International Packaging Co. *v.* United States, Slip Op. 95–110, (June 14, 1995) 890 F.Supp. 1095	Chicago Fibrous casings
C96/7 2/9/96 Tsoucalas, J.	Vista International Packaging, Inc.	93–05–00284, 93–05–00286	3917.10.10 6.6%	4823.90.85 5.3%	Vista International Packaging Co. *v.* United States, Slip Op. 95–110, (June 14, 1995) 890 F.Supp. 1095	Chicago Fibrous casings
C96/8 2/9/96 Tsoucalas, J.	Vista International Packaging, Inc.	93–06–00366, 93–06–00368, 93–07–00403	3917.10.10 6.6%	4823.90.85 5.3%	Vista International Packaging Co. *v.* United States, Slip Op. 95–110, (June 14, 1995) 890 F.Supp. 1095	Chicago Fibrous casings

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